No. 90-1141-CFX
Status: GRANTED

Title: Rafeh-Rafie Ardestani, Petitioner
v.
Immigration and Naturalization Service

Docketed:
December 3, 1990

Court: United States Court of Appeals
for the Eleventh Circuit

Counsel for petitioner: Soloway,David N.

Counsel for respondent: Solicitor General

40 printed rec'd 120590-1 retained 40 corr'd rec'd 011491 NOTE: See mail label re dkt dt

Entry	Date	Note	Proceedings and Orders
1	Dec 3 1990	G	Petition for writ of certiorari filed.
2	Feb 8 1991		Brief of respondent INS in opposition filed.
3	Feb 13 1991		DISTRIBUTED. March 1, 1991
4	Mar 4 1991		Petition GRANTED.
			**********
6	Mar 18 1991		Order extending time to file brief of petitioner on the merits until May 1, 1991.
7	Apr 25 1991	G	Motion of petitioner to dispense with printing the joint appendix filed.
8	May 1 1991		Brief amicus curiae of American Bar Association filed.
10	May 1 1991		Brief of petitioner Rafeh-Rafie Ardestani filed.
11	May 1 1991		Brief amicus curiae of American Immigration Lawyers Association filed.
9	May 2 1991		Lodging filed. 40 copies of report of ABA Coordinating Comm.
12	May 13 1991		Motion of petitioner to dispense with printing the joint appendix GRANTED.
14	Jun 4 1991		Order extending time to file brief of respondent on the merits until June 13, 1991.
15	Jun 13 1991		Brief of respondent INS filed.
16	Jul 12 1991		CIRCULATED.
17	Jul 17 1991	X	Reply brief of petitioner Rafeh-Rafie Ardestani filed.
18	Jul 19 1991		SET FOR ARGUMENT TUESDAY, OCTOBER 8, 1991. (3RD CASE)
19	Jul 30 1991		Certified record on appeal received.
20	Oct 8 1991		ARGUED.

(1)

90-1141

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RAFEH-RAFIE ARDESTANI, Petitioner,

V.

UNITED STATES DEPARTMENT OF JUSTICE,

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR

THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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January 10, 1991

QUESTION PRESENTED

1. Whether the Eleventh Circuit Court of Appeals erred in ruling that the Equal Access to Justice Act, which provides for the award of attorney's fees for successful litigants against the United States government in adversary adjudications, is inapplicable to immigration deportation proceedings.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner Rafeh-Rafie Ardestani and the Respondent, the United States Department of Justice, Immigration and Naturalization Service.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RAFEH-RAFIE ARDESTANI, Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

IMMIGRATION & NATURALIZATION SERVICE, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner Rafeh-Rafie Ardestani respectfully prays that a writ of certiorari issue to review the July 6, 1990 judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, and the September 5, 1990 denial of Petitioner's Petition for Rehearing and Suggestion of Rehearing In Banc by the United States Court of Appeals for the Eleventh Circuit in the above-entitled proceeding.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the Eleventh Circuit dated July 6, 1990, including the dissenting opinion of Hon. Virgil Pittman, is reported at 904 F.2d 1505 (11th Cir. 1990) and is reprinted in the appendix hereto, p. A1, infra.

The denial of Petitioner's petition for rehearing and suggestion of rehearing en banc dated September 5, 1990 is reported at 915 F.2d 698 (11th Cir.1990) . It is reprinted in the appendix hereto, p. A41, infra.

The opinion and judgment of the Board of Immigration Appeals dated May 12, 1989 has not been reported. It is reprinted in the appendix hereto, p. A43, infra.

The opinion and judgment of the Immigration Court dated January 27, 1989 is not reported. It is reprinted in the appendix hereto, p. A48, infra.

JURISDICTION

Invoking federal statutory law, 5 U.S.C. § 504, the Petitioner filed an Application for Attorney's Fees under the Equal Access to Justice Act with the Immigration Court in Atlanta, Georgia. On January 27, 1989, the Immigration Court awarded Petitioner attorney's fees under the Equal Access to Justice Act. See p. A48, infra.

Upon Respondent's appeal, on May 21, 1989 the Board of Immigration of Appeals entered a judgment and opinion reversing the Immigration Court's order and vacating the award of attorney's fees. See p. A43, infra.

Upon Petitioner's Petition for Review, on July 6, 1990 the Eleventh Circuit Court of Appeals affirmed the decision of the Board of Immigration Appeals. See p. A1, infra. Petitioner filed a Petition for Rehearing and Suggestion of Rehearing En Banc, and on September 5, 1990, the Eleventh Circuit Court of Appeals denied Petitioner's Petition and Suggestion. See p. A41, infra.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

5 U.S.C. § 504. Costs and fees of parties

(a)(1) An Agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record,

as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(3) The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.

(b) (1) For the purposes of this section-

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and

reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorney or agents for the proceedings involved, justifies a higher fee.);

(B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government or organization, the net worth of which did not exceed $7,000,00 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501)(c)(3) exempt form taxation under section 501(a) of such code, or a cooperative association, as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607), and (iii) any hearing conducted under chapter 38 of title 31;

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication; and

(E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based; except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings.

(2) Except as otherwise provided in paragraph (1), the definitions provided in section 551 of this title apply to this section.

(c)(1) After consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses. If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28, United States Code.

(2) If a party other than the United States is dissatisfied with a determination of fees and other expenses made under subsection (a) that party may, within 30 days after the determination is made, appeal the determination to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. The court's determination on any appeal heard under this paragraph shall be based solely on the factual record made before the agency. The court may modify the determination of fees and other expenses only if the court finds that the failure to make an award of fees and other expenses, or the calculation of the amount of the award, was unsupported by substantial evidence.

(d) Fees and other expenses awarded under this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(e) The Chairman of the Administrative Conference of the United States, after consultation with the Chief Counsel for Advocacy of the Small Business Administration, shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the congress in evaluating the scope and impact of such awards. Each agency shall provide the Chairman with such information as is necesary for the Chairman to comply with the requirements of this subsection.

(f) No award may be made under this section for costs, fees, or other expenses which may be awarded under section 7430 of the Internal Revenue Code of 1986.

STATEMENT OF THE CASE

On July 9, 1984, Petitioner, then a sixty-two year old woman of the Bahai faith, filed an application for asylum in the United States based upon her well-founded fear of persecution if she were forced to return to her native country of Iran. On November 5, 1984, the United States Department of State Office of Asylum Affairs, Bureau of Human Rights and Humanitarian Affairs determined that Petitioner had shown a "well founded fear of persecution upon return to Iran" in connection with her request for

asylum. Despite this recommendation, Respondent denied Petitioner's asylum application on February 12, 1986, based upon the unwarranted assertion that Petitioner had reached a "safe haven" in Luxembourg and had established residence there.

Counsel for Petitioner advised Respondent in writing that Petitioner had been in Luxembourg for only three days (as evidenced by her passport), for the sole purpose of visiting the United States Embassy pending her travel to the United States, and that during her time in Luxembourg, Petitioner stayed in a hotel and at no time applied for residency in Luxembourg. Respondent nevertheless issued an Order to Show Cause against Petitioner on March 31, 1986, charging her with impermissibly remaining in the United States. On April 10, 1986, Counsel for Petitioner sent Respondent another letter reiterating the salient facts, and when Respondent did not timely respond, Petitioner's counsel sent a third letter.

Despite these three letters, notice of hearing in deportation proceedings was sent to Petitioner on May 29, 1986. On June 11, 1986, a deportation proceeding was instituted against Petitioner before the

Immigration Court in Atlanta, Georgia. At that time, Petitioner renewed her request for asylum and introduced numerous exhibits into evidence in support of her case. At that hearing, Petitioner's passport, introduced into evidence, revealed that Petitioner thrice had been examined by Respondent: at her Port of Entry into the United States; at her interview on her asylum application; and prior to the issuance of an Order to Show Cause (when Respondent received a copy of Petitioner's passport which showed that she had been out of Iran for less than one month prior to entry into the United States, and that she had not received a visa or grant of residency from Luxembourg). Respondent presented no contrary evidence whatsoever, and Petitioner was granted asylum by the Immigration Court on October 23, 1986. Respondent did not appeal this decision.

Not only had Respondent invented its assertion, without any evidence whatsoever, that Petitioner established residence in Luxembourg, but it steadfastly persisted in its unwarranted position despite the three letters from Petitioner's counsel. On November 23, 1986, Petitioner filed an Application

for Attorney's fees under the Equal Access to Justice Act. The Application sought relief because the position and argument of Respondent had not been substantially justified, as contemplated by the Equal Access to Justice Act, 5 U.S.C. § 504.

On January 27, 1989, the Immigration Court awarded Petitioner attorney's fees in the sum of $1,071.85 pursuant to the Equal Access to Justice Act. See p. A48, infra. In its Order, the court held:

> [Petitioner] has requested attorney fees arguing that she prevailed when she was granted asylum. Quite clearly she is correct. I note that the Service has not filed an opposition to the request; but even if it had, it could not establish that its litigating position was justified. Prior to the issuance of the Order to Show Cause, she had provided information to the Service that she had not established residence in Luxembourg. The Service had ample opportunity to examine whether the information was true prior to issuing the Order to Show Cause. Further, on April 10, 1986, prior to the filing of the Order to Show Cause with this office, counsel again wrote to the district director requesting to resolve the matter before a hearing was scheduled....
>
> To prevail here, the Service must prove that its position was "solid though not necessarily correct in fact and law." McDonald v. Schweiker, 726 F.2d 311, 316 (C.A.7 1983). And, that the Service's position made the issue a close call even though it lost. Ulrich v. Schweiker, 548 F. Supp. 63 (D. Idaho 1982). The Service has provided nothing in support of its position. Moreover, it is highly unlikely that anything it might have provided could have caused it to prevail here.

Respondent appealed the decision of the Immigration Court to the Board of Immigration Appeals ("BIA"). The BIA issued a decision which did not focus upon the central legal issue of the applicability of the Equal Access to Justice Act to deportation proceedings. Instead, the BIA ruled issued a Ruling that regulations issued by the United States Attorney General (under whose authority the Immigration and Naturalization Service and the BIA operate) do not grant authority to an Immigration Judge to consider an Equal Access to Justice Act Application. The BIA noted that its conclusion was contrary to the landmark interpretation of the law, rendered by the United States Court of Appeals for the Ninth Circuit, and stated that the decision was not binding precedent for this case. The BIA vacated the decision of the Immigration Court and denied Petitioner's Equal Access to Justice Act Application. See p. A43, infra.

Petitioner appealed the Board of Immigration Appeals' decision to the United States Court of Appeals for the Eleventh Circuit. In its July 6, 1990 divided decision, the court affirmed the decision of the Board of Immigration Appeals and held that the

Equal Access to Justice Act did not apply to immigration deportation proceedings. In its decision, the majority rejected the holding of Escobar-Ruiz v. INS (supra) and held that the Equal Access to Justice Act's attorney fees provisions do not apply to immigration deportation proceedings. See p. A1, infra. In a strongly articulated dissenting opinion, however, Judge Pittman urged adoption of the holding and rationale of Escobar-Ruiz v. INS (supra), in order not to frustrate Congress' basic purpose in enacting the Equal Access to Justice Act. He concluded that the facts of this case demonstrate the very type of completely unjustified government agency actions that Congress envisioned would be covered by the Equal Access to Justice Act. See p. A1, infra.

Petitioner filed a petition for Rehearing and Suggestion of Rehearing En Banc on this important issue. In its September 6, 1990 decision, the United States Court of Appeals for the Eleventh Circuit denied Petitioner's Petition and Suggestion. See p. A41, infra.

REASONS FOR GRANTING THE WRIT

I.

THE RULING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, HOLDING THAT THE EQUAL ACCESS TO JUSTICE ACT DOES NOT APPLY TO IMMIGRATION DEPORTATION PROCEEDINGS UNDER 5 U.S.C. § 504 HAS CREATED A REAL AND INTOLERABLE CONFLICT AMONG THE FEDERAL CIRCUITS ON THIS ISSUE.

By its decision in this case, holding that the Equal Access to Justice Act ("EAJA") is inapplicable to immigration deportation proceedings under 5 U.S.C. § 504, the United States Court of Appeals for the Eleventh Circuit expressly has rejected the statutory interpretation of the Ninth Circuit Court of Appeals's landmark decision Escobar-Ruiz v. I.N.S. 787 F.2d 1294 (9th Cir. 1986) ("Escobar-Ruiz I"), reh'g denied, 813 F.2d 283 (9th Cir. 1987) ("Escobar-Ruiz II"), aff'd 838 F.2d 1020 (9th Cir. 1988) (en banc) ("Escobar-Ruiz III"). In a series of three opinions, the Ninth Circuit Court of Appeals had held that immigration deportation proceedings are "adversary adjudications" as contemplated in 5 U.S.C. § 504 (a)(1), and are the very type of proceedings for which governmental abuse

was to be addressed through EAJA awards of attorney's fees. Id.

Escobar-Ruiz II examined EAJA's statutory language, which in turn required examination of its legislative history and statutory purpose. 813 F.2d at 291. The statutory purpose was gleaned from the Congressional records and the commentary to the Administrative Conference of the United States Model Rules for Agency Implementation of EAJA (which implored that the term "adversary adjudication" be interpreted broadly to serve EAJA's stated goals, rather than hypertechnically to frustrate them). Id. See Office of the Chairman of the Administrative Conference of the United States Equal Access to Justice Act. Agency Implementation, 46 Fed. Reg. 32,900 (June 25, 1981).

The application of EAJA to deportation proceedings is now in a state of chaos. Respondent disapproves of the Escobar-Ruiz decision, and has implemented a policy of non-acquiesence in the Ninth Circuit, where Escobar-Ruiz is controlling law. To date, Respondent has not paid the attorney's fees awarded in Escobar-Ruiz, nor has it paid any other EAJA awards in deportation cases in the Ninth Circuit

or elsewhere. See 67 Interpreter Releases 798 (July 23, 1990). The divided decision of the Eleventh Circuit Court of Appeals in the case at bar aggravates the contention over the legal issue and may be treated as justification for Respondent's "non-acquiescence" in the Ninth Circuit.

The drastically divergent interpretation of the same statute among the Federal Circuits results in the availability of EAJA awards to hold Respondent accountable for, and to deter, unjustifiable and unwarranted litigation in the Ninth Circuit, but not in the Eleventh Circuit. The decision of the court below has created a real and intolerable conflict between the Federal Circuits and only a review by this Court can bring about a uniformity of decisions with respect to this issue.

II.

THE RULING OF THE COURT BELOW IS INCONSISTENT WITH AND FRUSTRATES THE LEGISLATIVE PURPOSE OF THE EAJA STATUTE.

EAJA, enacted as Title II of Public Law 96-481, is derived from Senate Bill 265 (S.265), as amended and recommended for passage by the Committee on the

Judiciary in House Report No. 96-1418 (September 26, 1980). EAJA's express purpose is to reduce the economic deterrents and the disparity in resources and expertise between the United States government and others who would seek review of or who would defend against unjustified governmental action, by entitling certain prevailing parties to recover attorneys fees and other expenses. H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. (1980), reprinted in [1980] U.S. Code Cong. and Ad. News, p. 4984.

EAJA represents Congressional recognition that without EAJA's sanctions, a party may have no realistic opportunity to respond in the face of unjustified governmental action, and no effective remedy to secure vindication of his or her rights, causing the individual to endure a governmentally inflicted injustice rather than to contest it. Id. at 4988. See also Spencer v. N.L.R.B. 712 F.2d 539, 549 (D.C. Cir. 1983).

EAJA is premised upon the concept that one who litigates against the government is refining and formulating public policy. H.R. Rep. No. 96-1418 at 4991. EAJA "helps to assure that administrative

decisions reflect informed deliberation," thereby providing a vehicle for "curbing excessive regulation and the unreasonable exercise of Government authority." Id.

In legislative hearings addressing the reauthorization of EAJA in 1985 (H.R. 2378), Congress repeatedly expressed its disapproval of restrictive interpretations of EAJA. See, H.R. No. 99-120 (1985), [1985] U.S. Code Cong. & Ad. News. 132, 137. Congress criticized "overly technical" judicial construction of certain terms (eg. "substantially justified" Id. at 146, and "prevailing party" Id. at 147). The original Act contemplated "an expansive view" Id. at 147, and the adoption of the "broader meaning" of such terminology in order to effectuate its goals. Id. 137

As will be more fully explained by Petitioner if this Court grants certiorari for consideration of the case, the court below erred in its decision by adopting an overly technical judicial construction to the statutory term "adversary adjudication ... under Section 554." This wooden interpretation circumvents EAJA's goals and Congress's intent.

III.

IT IS IN THE PUBLIC INTEREST FOR THIS COURT TO REVIEW THE LOWER COURT'S DECISION WHICH EFFECTIVELY REMOVED GOVERNMENT ACCOUNTABILITY TO THE GROUP OF PEOPLE MOST VULNERABLE TO THE COMPLEXITIES AND HARSH CONSEQUENCES OF EXCESSIVE AND OVERZEALOUS ADVERSARIAL GOVERNMENT ACTIONS.

Aliens in deportation proceedings are perhaps the most vulnerable to the complexities and harsh consequences of excessive and overzealous actions taken by the government in adversary proceedings. The public interest mandates that such people not be forced to choose, presuming they are financially able to do so, between (1) deportation, often with the gravest of all consequences (see: Ng Fung Ho v. White 259 U.S. 276, 284 (1922) (deportation could deprive one of "all that makes life worth living"); moreover, deported aliens may face torture or death upon return to their homelands); or (2) years of costly and complex†

† The provisions of the Immigration and Nationality Act have been recognized as being so complex and so lacking in consistency as to be incomprehensible to the layman and the general practitioner alike. See, Lok v. INS 548 F.2d 27, 28 (2d Cir 1977)

litigation unjustifiably initiated or perpetuated by the government. As deftly articulated by the American Immigration Lawyers Association and the National Immigration Project of the National Lawyers Guild, Amici Curiae in the court below:

> In the absence of any [EAJA] provision to reimburse the successful litigant for the time and expense of representing the public interest in challenging unjustified government action, the dreams of these dislocated, unassimilated, often poor and less educated, but honest human beings, who historically have formed the very foundation of our pluralistic society, may well be frustrated.††

The public interest will be served, and respect for the law will be enhanced, by this Court's protection of the rights of those least able to bear the brunt of excessive and unjustifiable adversary proceedings undertaken by the government itself. The public interest also will be served by holding a federal agency, such as Respondent, accountable for the fair and reasoned exercise of its authority, and by affording people in deportation proceedings due process of law.

†† Brief of Amici Curiae on Behalf of Appellant before the Eleventh Circuit Court of Appeals, p.4

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted, and this Court should allow Petitioner to file her brief and to articulate more comprehensively why the narrow and hypertechnical interpretation of EAJA made by the court below is erroneous, and why the rationale of the Ninth Circuit Court of Appeals should be adopted and embraced by this Court.

Respectfully submitted,

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ARDESTANI v. U.S. DEPT. OF JUSTICE, I.N.S.

Rafeh-Rafie ARDESTANI, Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 89-8458.

United States Court of Appeals,
Eleventh Circuit.

July 6, 1990.

Immigration and Naturalization Service appealed from immigration judge's order awarding alien attorney fees under Equal Access to Justice Act after she prevailed in deportation proceeding. The Board of Immigration Appeals ruled that immigration judge was not authorized to award attorney fees, and alien petitioned for review. The Court of Appeals, Fay, Circuit Judge, held that Equal Access to Justice Act did not apply to deportation proceedings.

Affirmed.

Pittman, Senior District Judge, sitting by designation, filed dissenting opinion.

1. **Administrative Law and Procedure**
Key 791

Aliens Key 54.3(4)

Substantial evidence standard applies to review of factual evidence considered by immigration judge and Board of Immigration Appeals in deportation decision.

2. **Administrative Law and Procedure Key 741**

Aliens Key 54.3(2)

Court of Appeals' review of legal decision by immigration judge and Board of Immigration Appeals was plenary.

3. **United States Key 147(11)**

Equal Access to Justice Act's attorney fee provisions did not apply to deportation proceedings. 5 U.S.C.A. § 504(a)(1); 28 U.S.C.A. § 2412(d)(1)(A); Immigration and Nationality Act, § 292, as amended, 8 U.S.C.A. § 1362.

4. **United States Key 125(5)**

Consent necessary to waive sovereign immunity must be express and not implied.

5. **United States Key 147(5)**

Equal Access to Justice Act waives sovereign immunity in allowing attorney fees against United States and must be construed strictly. 5 U.S.C.A. § 504(a)(1); 28 U.S.C.A. § 2412(d)1)(A).

6. United States Key 147(5)

Explicit bar on attorney fees against government found in Immigration and Nationality Act is to be regarded as narrow exception to general provisions of Equal Access to Justice Act and thus partial repeal of statutory bar by implication is unwarranted to achieve broad purposes of Equal Access to Justice Act. Immigration and Nationality Act, § 292, as amended, 8 U.S.C.A. § 1362; 5 U.S.C.A. § 504(a)(1); 28 U.S.C.A. § 2412(d)(1)(A).

Petition for Review of an Order of the Immigration and Naturalization Service.

Before FAY, Circuit Judge, RONEY*, Senior Circuit Judge, and PITTMAN**, Senior District Judge.

FAY, Circuit Judge:

This case presents the first impression issue for this circuit of whether or not the Equal Access to Justice Act (EAJA) applies to immigration deportation proceedings. Appellant Rafeh-Rafie Ardestani was awarded attorney fees under EAJA as the prevailing

* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Virgil Pittman, U.S. Senior District Judge for the Southern District of Alabama, sitting by designation.

party in a deportation proceeding by an immigration judge. Appellee the Immigration and Naturalization Service (INS) appealed, arguing that EAJA was inapplicable to deportation proceedings. Upon review, the Board of Immigration Appeals (Board) vacated the decision of the immigration judge and concluded that deportation proceedings are not within the scope of EAJA. Ardestani appeals. Our examination of the relevant statutes has revealed no Congressional intent that EAJA apply to deportation proceedings. Accordingly, we affirm the Board's decision because we find no subject matter jurisdiction.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant Ardestani, an Iranian woman, entered the United States as a visitor on December 14, 1982. She remained in this country legitimately pursuant to authorized extensions until May 30, 1984. Fearing persecution upon her return to Iran, Ardestani applied for asylum in the United States on July 9, 1984. The United States Department of State informed INS that Ardestani's concerns was well founded.

On February 15, 1985, INS notified Ardestani of its intention to deny her request for political

asylum, but allowed her the opportunity to submit additional evidence in support of her application. Ardestani claims that she never received this notification. INS denied Ardestani's asylum application on February 2, 1986. This decision was based upon Ardestani's failure to disclose her previous safe haven in Luxembourg, a liberal country in granting residency to political refugees, and her attempt to use the political asylum process in order to disguise her original entry into the United States as an immigrant intending to stay permanently rather than as a refugee seeking asylum. Because her asylum application was denied, INS specified that Ardestani could not remain in the United States beyond February 27, 1986, without its permission. Ardestani's counsel informed INS that her client merely stayed at a hotel in Luxembourg for three days for the purpose of obtaining a visa from the American embassy in order to enter the United States and that she never applied for residency in Luxembourg.

On March 31, 1986, INS issued Ardestani an order to show cause why she should not be deported because she had entered the United States as a nonimmigrant

and had remained longer than the time permitted by INS. Appellant's counsel concedes that notification of deportation proceedings was sent to Ardestani on May 29, 1986. Appellant's Brief at 3. Significantly, that notification contains the following notice:

> NOTE: YOU MAY BE REPRESENTED IN THIS PROCEEDING, AT NO EXPENSE TO THE GOVERNMENT, BY AN ATTORNEY OR OTHER INDIVIDUAL AUTHORIZED AND QUALIFIED TO REPRESENT PERSONS BEFORE AN IMMIGRATION JUDGE. IF YOU WISH TO BE SO REPRESENTED, YOUR ATTORNEY OR REPRESENTATIVE SHOULD APPEAR WITH YOU AT THE HEARING.

R1-120 (emphasis added).

At the deportation hearing conducted on June 11, 1986, Ardestani conceded that she was deportable, but renewed her asylum application. Additionally, the immigration judge received into evidence the show cause order, the State Department letter regarding her asylum request, and a copy of her passport. On October 26, 1986, the immigration judge entered his decision and order, stating that Ardestani had established a well founded fear of persecution under the Immigration and Nationality Act and granting her

asylum for one year. INS did not appeal this decision.

Achieving the relief sought in the deportation proceedings, Ardestani's counsel applied for attorney fees and expenses as the prevailing party under EAJA. The application included letters from the counsel to the INS district director and other documents which were not part of the record at the deportation hearing. INS did not respond to this application.

On January 27, 1989, the immigration judge issued his opinion in Ardestani's deportation proceedings. Recognizing that "EAJA provides for awards for attorney fees in adjudicatory proceedings before administrative agencies" under 5 U.S.C. section 504(a)(1), the immigration judge concluded that Ardestani was the prevailing party and that the opposition of INS was not substantially justified. R1-62. The immigration judge awarded attorney fees in the amount of $1,071.85.

On February 9, 1989, INS apealed this award of attorney fees to the Board of Immigration Appeals. INS contended that EAJA was inaplicable to deportation proceedings; therefore, the immigration judge was not

authorized to award attorney fees. Alternatively, INS argued that its position was substantially justified because, as Ardestani conceded, deportation was warranted under the immigration statute. Ardestani responded that attorney fees were available under EAJA for a deportation proceeding and that the position of INS was not substantially justified.

On May 12, 1989, the Board vacated the award of attorney fees and costs by the immigration judge and denied the application. Disagreeing that deportation proceedings are encompassed by EAJA, the Board reasoned that the binding regulations of the United States Attorney General in 28 C.F.R. section 24.103, providing that deportation proceedings are not within the scope of EAJA, presented "a more fundamental reason" to vacate the decision of the immigration judge. R1-2. The Board, therefore, determined that the immigration judge had no authority to award attorney fees and costs under EAJA. Pursuant to 5 U.S.C. section 504(c)(2), Ardestani appealed to this court.

II. EXPLICATION

A. Standards of Review

[1,2] When a decision by the Board of Immigration Appeals is supported by substantial evidence, "Congress has mandated that we defer to the Board and affirm." Blackwood v. INS, 803 F.2d 1165, 1168 (11th Cir. 1986) (per curiam); 8 U.S.C. § 1105a(a); Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951); Arauz v. Rivkind, 845 F.2d 271, 275 (11th Cir. 1988); Chavarria v. United States Dep't of Justice, 722 F.2d 666, 670 (11th Cir. 1984). As Arauz, Blackwood and Chavarria demonstrate, however, the substantial evidence standard applies to review of the factual evidence considered by the immigration judge and Board in a deportation decision and not a purely legal issue as we have in this case. Because there are no contested factual issues in this case and we decide solely a question of law, our review is plenary. Hamer v. City of Atlanta, 872 F.2d 1521, 1526 (11th Cir. 1989); Bailey v. Carnival Cruise Lines, Inc., 774 F.2d 1577, 1578 (11th Cir. 1985).

B. Statutory Analysis

[3] To determine the applicability of EAJA to deportation proceedings, we must examine the interaction of the relevant statutes and regulations in order to maintain the integrity of Congressional intent. We are guided in this inquiry by principles of statutory interpretation established by the Supreme Court. "The starting point in statutory interpretation is 'the language [of the statute] itself.'" United States v. James, 478 U.S. 597, 604, 106 S.Ct. 3116, 3120, 92 L.Ed.2d 483 (1986) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (Powell, J., concurring)); Newman v. Soballe, 871 F.2d 969, 971 (11th Cir. 1989). Reviewing courts assume "'that the legislative purpose is expressed by the ordinary meaning of the words used'" in the statute. American Tobacco Co. v. Patterson, 456 U.S. 63, 68, 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748 (1982)(quoting Richards v. United States, 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962)) Director, Office of Workers' Compensation Programs v. Drummond Coal Co., 831 F2d 240, 245 (11th Cir. 1987); see INS v. Cardoza-Fonseca,

480 U.S. 421, 431, 107 S.Ct. 1207, 1213, 94 L.Ed.2d 434 (1987). The "strong presumption" that the plain language of the statute expresses Congressional intent is rebutted only in "°rare and exceptional circumstances,'" when contrary legislative intent is expressed clearly. Cardoza-Fonseca, 480 U.S. at 432 n. 12, 107 S.Ct. at 1213 n. 12 (citations omitted); Rubin v. United States, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981); see Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc. 447 U.S. 102, 108, 100, S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980); United States v. Hurtado, 779 F.2d 1467, 1476-77 (11th Cir. 1985); National Wildlife Fed'n v. Marsh, 721 F.2d 767, 773-74 (11th Cir. 1983).

[4.5] We also must consider the important principle of statutory construction concerning the waiver of sovereign immunity by the United States. The Supreme Court has held that "[i]n analyzing whether Congress has waived the immunity of the United States, we must construe waivers strictly in favor of the sovereign." Library of Congress v. Shaw, 478 U.S. 310, 318, 106 S.Ct. 2957, 2963, 92 L.Ed.2d 250 (1986); Ruckelshaus v. Sierra Club, 463 U.S. 680, 685-86, 103

S.Ct. 3274, 3277-78, 77 L.Ed.2d 938 (1983); McMahon v. United States, 342 U.S. 25, 27, 72 S.Ct. 17, 19, 96 L.Ed. 26 (1951); Loftin v. Rush, 767 F.2d 800, 808, (11th Cir. 1985). The necessary consent to waive this traditional immunity must be express and not implied. Library of Congress, 478 U.S. at 318, 106 S.Ct. at 2963; United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 659, 67 S.Ct. 601, 604, 91 L.Ed. 577(1947). A count may not "grant attorneys' fees and costs against the United States in the absence of a congressional or constitutional waiver of sovereign immunity which grants it the authority to do so." Ewing & Thomas, P.A. v. Heye, 803 F.2d 613, 616 (11th Cir.1986). Since EAJA waives sovereign immunity in allowing attorney fees against the United States, it must be construed strictly. Haitian Refugee Center v. Meese, 791 F.2d 1489, 1494 (11th Cir.), vacated in part on other grounds, 804 F.2d 1573 (11th Cir.1986); see In re Perry, 882 F.2d 534, 538 (1st Cir. 1989); Owens v. Brock, 860 F.2d 1363, 1366 (6th Cir.1988); Action on Smoking & Health v. Civil Aeronautics Bd., 724 F.2d 211, 225 (D.C.Cir.1984); Fidelity Constr. Co. v. United States, 700 F.2d 1379, 1385 (Fed. Cir.)

cert. denied, 464 U.S. 826, 104 S.Ct. 97, 78 L.Ed.2d 103 (1983).

EAJA contains the following two similar provisions for attorney fees and costs:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

5 U.S.C. § 504(a)(1).

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses ... incurred by that party in any civil action (other than cases sounding in tort),

> including proceedings for judicial review of agency action ... unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). Both of these sections direct the court to award fees and expenses to a prevailing party in an adversary adjudication by administrative agencies as authorized by section 504(b)(1)(C). 5 U.S.C. § 504(b)(1)(C); 28 U.S.C. § 2412(d)(3). An "adversary adjudication" is defined as "an adjudication under section 554" of the Administrative Procedure Act (APA) in which the position of the United States is represented by counsel. 5 U.S.C. § 504(b)(1)(C).

While there has been no dispute in this case that a deportation proceeding is an adjudication where the position of the United States is represented by counsel, INS contends that a deportation proceeding is an adversary adjudication under the Immigration and

Nationality Act (the Act)[1] and not under the APA. Two circuit courts have polarized the analysis of the phrase "an adjudication under section 554" of section 504(b)(1)(C) in order to determine the relationship of section 554 of the APA to an EAJA adversary adjudication. Owens v. Brock, 860 F.2d 1363 (6th Cir.1988); Escobar Ruiz v. INS, 838 F.2d 1020 (9th Cir.1988) (en banc). Ardestani contends that Escobar Ruiz controls this case, while INS argues that Owens should dictate our result.

Since appellant has argued that EAJA creates a definitional bridge by using the APA to place deportation proceedings within EAJA for the purpose of awarding attorney fees, we also must examine this language. Both the Sixth and Ninth Circuits examined the explanatory statement of the EAJA conference committee, which delineated that the statute "defines adversary adjudication as an agency adjudication defined under the Administrative Procedures Act where

1. The Act provides that mandatory deportation proceedings require that a "[d]etermination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present." 8 U.S.C. § 1252(b).

the agency takes a position through representation by counsel or otherwise. H.R.Conf.Rep. No. 1434, 96th Cong., 2d Sess. 23 (1980), reprinted in 1980 U.S. Code Cong. & Admin.News 4953, 5003, 5012; Owens, 860 F.2d at 1365; Escobar Ruiz, 838 F.2d at 1023. The Ninth Circuit interpreted this statement to mean that the determination of an adversary adjudication requires "look[ing] at the procedures by which deportation hearings are actually conducted, rather than determining whether such hearings are technically governed by the APA." Escobar Ruiz, 838 F.2d at 1023. After determining that the procedures of the Act and the APA are "fundamentally identical," the Ninth Circuit concluded that a deportation proceeding conforms to APA requirements and "constitutes an adversary adjudication as defined under the APA." Id. at 1025.

The Sixth Circuit interpreted the same conference committee statement contrariwise: "[T]he use of a concrete term such as °defined' leads us to believe it probable that Congress intended precisely the opposite interpretation of section 504(b)(1)(C) from the one taken by the Ninth Circuit." Owens, 869 F.2d at 1366. The Sixth Circuit bolstered its conclusion by commen-

tary from the model rules for agency implementation of EAJA issued by the Administrative Conference of the United States (ACUS), wherein ACUS expressed concern that a liberal interpretation might provide for broader applicability than Congress intended. 46 Fed.Reg. 32,901(1981); Owens, 860 F.2d at 1366. As a result of this concern, ACUS eliminated EAJA coverage for agency proceedings voluntarily using section 554 procedures and commented that "[t]here remains, however, the difficult question of what proceedings are °under section 554.' Where it is clear that certain categories of proceedings are governed by this section, agencies should list the types of proceedings in their rules." 46 Fed.Reg. at 32,901; Owens, 860 F.2d at 1366. Juxtaposing the legislative history with the construction principle that waiver of immunity is to be narrowly construed, the Sixth Circuit concluded that the Ninth Circuit opinion "cannot withstand scrutiny" and is merely an advisory opinion since the original panel's determination that the plaintiff in Escobar Ruiz was not a prevailing party was unaffected by the en banc question of the application of EAJA to awards for attorney fees. Owens, 860 F.2d at 1366 & n.2.

Recently scrutinizing the reference in EAJA to "under section 554" of the APA, the District of Columbia Circuit also rejected the Ninth Circuit's interpretation. St. Louis Fuel & Supply Co. v. FERC, 890 F.2d 446, 449-51 (D.C. Cir.1989). Finding that Department of Energy proceedings are outside the "adversary adjudication" coverage of EAJA, the District of Columbia Circuit concluded that "under" in section 504(b)(1)(C) had the meaning of "subject [or pursuant] to" or "by reason of the authority of" because of the meaning of the word 'under' in other sections of EAJA. Id. at 450. That court stated: "We are unwilling so [as the Ninth Circuit] to stretch the word "under" because the usage of the word in EAJA itself tugs against such creative reading, and because we are bound to honor the canon that waivers of the sovereign's immunity must be strictly construed." Id. at 449-50; see 5 U.S.C. §§ 504(a)(2), (c)(2), (d). The court also found no definitional distinction in the House and Senate bills. St. Louis Fuel & Supply Co., 890 F.2d at 450-51. We are persuaded by the reasoning of the Sixth and District of Columbia Circuits as well as by a recent Third Circuit decision

in accord with our rationale herein that there is no "°clearly expressed legislative intention'" contrary to the statutory language "which would require us to question the strong presumption that Congress expresses its intent" that "under" in section 554 means "governed by" or "subject to" section 554. Cardoza-Fonseca, 480 U.S. at 432 n. 12, 107 S.Ct. at 1213 n. 12 (citations omitted); Clarke v. INS, F.2d, Nos. 89-3477 & 90-3125 (3d Cir. May 24, 1990).

Furthermore, the Supreme Court has held that the hearing requirements of the APA do not govern deportation proceedings, which are controlled under section 242 of the Act, 8 U.S.C. section 1252. Marcello v. Bonds, 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107 (1955). Discussing the history of the immigration laws, the Court conceded that, before amendment of the immigration laws in 1951, it had held that the APA applied to deportation proceedings in Wong Yang Sung v. McGrath, 339 U.S. 33, 70 S.Ct. 445, 94 L.Ed. 616 (1950), modified on other grounds, 339 U.S. 908, 70 S.Ct. 564, 94 L.Ed. 1336 (1950). Marcello, 349 U.S. at 306, 75 S.Ct. at 759. In Marcello, the Court had to determine whether or not an additional amendment to

the immigration laws in 1952 has restored the law to its former position, where the hearing provisions of the APA would govern deportation proceedings. While the Court concluded that the provisions for hearings under the APA and the Act were identical in many respects, it attributed these similarities to the fact that the APA was a model for the Act. Marcello, 349 U.S. at 307-08, 75 S.Ct. at 759-60. The Court determined that section 242 of the Act is a deliberate effort by Congress to create a separate procedure tailored to deportation proceedings:

> From the Immigration Act's detailed coverage of the same subject matter dealt with in the hearing provisions of the Administrative Procedure Act, it is clear that Congress was setting up a specialized administrative procedure applicable to deportation hearings, drawing liberally on the analogous provisions of the Administrative Procedure Act and adapting them to the particular needs of the deportation process. The same legislators ... sponsored both the Administrative Procedure Act and the Immigration Act, and the framework of the latter indicates clearly that the Administrative Procedure Act was being used as a

model. But it was intended only as a model, and when in this very particularized adaptation there was a departure from the Administrative Procedure Act - based on novel features in the deportation process- surely it was the intention of the Congress to have this deviation apply and not the general model.

[W]e cannot ignore the background of the 1952 immigration legislation, its laborious adaptation of the Administrative Procedure Act were made, the recognition in the legislative history of this adaptive technique and of the particular deviations, and the direction in the statute that the methods therein prescribed shall be the sole and exclusive procedure for deportation proceedings. Marcello, 349 U.S. at 308-09, 310, 75 S.Ct. at 760-61, 762.

Marcello has not been legislatively or judicially overruled. See Ho Chong Tsao v. INS, 538 F.2d 667, 669 (5th Cir.1976)(per curiam), cert. denied, 430 U.S. 906, 97 S.Ct. 1176, 51 L.Ed. 582(1977); Giambanco v. INS, 531 F.2d 141, 144 (3d Cir.), cert. denied, 429 U.S. 853, 97 S.Ct. 145, 50 L.Ed.2d 127 (1976) (These cases recognize the inapplicability of section 554 to deportation proceedings under the procedures of the

Act.). In Ho Chong Tsao, the former Fifth Circuit followed the Third Circuit's reliance on Marcello in holding that "the APA has no relevance" to the Board's review of an immigration judge's refusal to revoke the alien petitioner's deportation order. Ho Chong Tsao, 538 F.2d at 669; see Giambanco, 531 F.2d at 145. Since EAJA defines an "adversary adjudication" as an adjudication under section 554" of the APA, Marcello remains authoritative in its determination that deportation proceedings under section 242 of the Act are not adjudications under section 554 of the APA.

Additional persuasive support that deportation proceedings are not under EAJA is found in the implementing regulation for EAJA by the Attorney General. 28 C.F.R. 24.103(1982); see 8 U.S.C. § 1103(a). This regulation lists the proceedings covered by EAJA, with "proceeding" defined as an "adversary adjudication: under section 554 of the APA. 28 C.F.R. 24.102(b), (e) & 24.103. Deportation proceedings have not been added in the most recent promulgation of this list, which includes Drug Enforcement Administration hearings, handicap discrimination hearings and civil rights hearings. 28 C.F.R. 24.103 (1989). This

regulation also states that "[i]f a proceeding includes both matters covered by the Act [EAJA] and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues." 28 C.F.R. 24.103(b). Deportation proceedings are omitted from the specific list of included adversary adjudication proceedings covered by EAJA. See Russello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983) ("°[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972) (per curiam))).

Furthermore, supplemental information published with the preceding interim rule before codification of this regulation reveals that deportation proceedings intentionally were excluded pursuant to Marcello. 46 Fed.Reg. 48,922 (1981). Presumably, Congress was aware of this administrative interpretation when it reenacted and amended 5 U.S.C. section 504 in 1985, without including deportation proceedings. The indi-

cation is that the interpretation by the Attorney General influenced Congressional action. See Cannon v. University of Chicago, 441 U.S. 677, 698-99, 99 S.Ct. 1946, 1958-59, 60 L.Ed.2d 560 (1979); Lorillard v. Pons, 434 U.S. 575, 581, 98 S.Ct. 866, 870, 55 L.Ed.2d 40 (1978).

Congress has changed or clarified the coverage of EAJA since its initial enactment in 1980 in response to judicial and legislative interpretations. In 1985, for example, it expanded the definition of "adversary adjudication" to include any appeal of a decision made under section 6 of the Contract Disputes Act of 1978 to overrule the Federal Circuit's Fidelity Constr. Co. holding that EAJA was inapplicable to these decisions. 5 U.S.C. § 504(b)(1)(C)(ii); H.R.Rep. No. 120, 99th Cong., 1st Sess., pt. 1, at 15 (1985), reprinted in 1985 U.S.Code Cong. & Admin.News 132, 144; see also 5 U.S.C. § 504(b)(1)(C)(iii)(In 1986, Congress amended EAJA to include hearings conducted under chapter 38 of title 31, Administrative Remedies and False Claims and Statements.). Additionally, the legislative history of the 1985 EAJA, Extension and Amendments, clarified coverage for Social Security Administration hearings

at the administration level without amending EAJA. The House Report strongly implied that such hearings are "adjudications" under section 554 of the APA so that they become "adversary adjudications" under EAJA when the position of the United States is represented by counsel. H.R.Rep. No. 120, 99th Cong., 1st Sess., pt. 1, at 10 (1985), reprinted in 1985 U.S. Code Cong. & Admin.News 132, 138-39.

Title 5 U.S.C. section 504(c)(1) provides that "[a]fter consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses." Following review of the relevant regulations, ACUS did not criticize the Attorney General's interpretation regarding the inapplicability of EAJA to deportation proceedings. See 47 Fed.Reg. 15,774-76 (1982). Although Congress was silent as to the applicability of EAJA to deportation proceedings, the Attorney General's relevant regulation enacted after consultation with ACUS is a reasonable construction of EAJA. "[I]f the statute is silent or ambiguous with respect to the specific

issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron, U.S.A., Inc v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984); De Cuellar v. Brady, 881 F.2d 1561, 1565 (11th Cir.1989); Shoemaker v. Bowen, 853 F.2d 858, 861 (11th Cir.1988). The Attorney General permissibly interpreted the EAJA phrase "under section 554" by concluding in 28 C.F.R. section 24.103 that deportation proceedings are not covered by the APA and, therefore, are not within the scope of EAJA.

Having determined that deportation proceedings are not included under EAJA for the purpose of awarding attorney fees to the prevailing party, we must consult the Act for guidance on this question, as instructed by Marcello. EAJA also directs us to the Act by the admonition that "[e]xcept as otherwise specifically provided by statute," it should be followed. 28 U.S.C. § 2412(d)(1)(A). Section 292 of the Act states that "[i]n any exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the

Government) by such counsel, authorized to practice in such proceedings, as he shall choose." 8 U.S.C. § 1362 (emphasis added). In addition to this provision clearly barring attorney fees awarded against the government, Ardestani was informed specifically in her notification of her deportation hearing before the immigration judge that she would not be entitled to attorney fees in language which mirrors the statute.

Even if we had not decided that EAJA does not control the award of attorney fees in deportation proceedings, the Supreme Court has established principles of construction for harmonizing two statutes. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." Morton v. Mancari, 417 U.S. 535, 550-51, 94 S.Ct. 2474, 2482-83, 41 L.Ed.2d 290 (1974); Smith v. Christian, 763 F.2d 1322, 1325 (11th Cir.1985) (per curiam); see also Radzanower v. Touche Ross & Co., 426 U.S. 148, 153, 96 S.Ct. 1989, 1992, 48 L.Ed.2d 540 (1976) ("it is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a

later enacted statute covering a more generalized spectrum."). The Court also has held that "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." Morton, 417 U.S. at 550, 94 S.Ct. at 2482; Estate of Flanigan v. Commissioner, 743 F.2d 1526, 1532 (11th Cir.1984).

Section 292 of the Act expressly states that individuals involved in deportation proceedings shall have the privilege of representation by counsel of choice "at no expense to the government." 8 U.S.C. § 1362. While EAJA removes common law and sovereign immunity barriers to awarding attorney fees against the government in appropriate cases, there is no indication that it was intended to abrogate particular statutory provisions specifically barring fee shifting. See e.g., H.R.Rep. No. 1418, 96th Cong., 2d Sess. at 8-9 (1980), reprinted in 1980 U.S. Code Cong. & Admin.News 4984, 4986-88. This court has stated that there are three predicate findings to an award of fees and expenses under EAJA: "(1) the litigant opposing the United States must be a °prevailing

party'; (2) the government's position must not have been substantially justified; and (3) there must be no circumstances that make an award against the government unjust." Jean v. Nelson, 863 F.2d 759, 765 (11th Cir.1988), cert.granted, ___ U.S. ___, 110 S.Ct. 862, 107 L.Ed.2d 947 (1990). We conclude that the first two prerequisites concern the facts of the individual case and that they are not issues in this case because we are reviewing the legal issue of the availability of attorney fees when the alien is successful against the government at a deportation proceeding. We find that the third requirement for awarding attorney fees under EAJA is controlling because section 1362 explicitly precludes attorney fee awards in deportation proceedings. It would be unjust to allow such an award against the government since Congress specifically has determined that fees against the government are not available in this context.

The general language of EAJA is insufficient to overcome the absolute words of the Act. The primary purpose of EAJA is "to increase the accessibility to justice-in administrative proceedings and civil actions." H.R.Rep. No. 120, 99th Cong. 1st Sess., pt.

1, at 8 (1985), reprinted in 1985 U.S. Code Cong. & Admin.News 132, 136. In rejecting the Second Circuit's reliance on the "broad purposes" of a later-enacted statute to establish partial repeal by implication, the Supreme Court held that "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the [later-enacted] statute's primary objective must be the law." Rodriguez v. United States, 480 U.S. 522, 525-26, 107 S.Ct. 1391, 1393-94, 94 L.Ed.2d 533 (1987) (per curiam) (emphasis in original); see Patel v. Quality Inn South, 846 F.2d 700, 704 (11th Cir.1988) ("[A]mendments by implication are disfavored. Only when Congress' intent to repeal or amend is clear and manifest will we conclude that a later act implicitly repeals or amends an earlier one."), cert. denied, ___ U.S. ___, 109 S.Ct. 1120, 103 L.Ed.2d 182 (1989). Relying on and reinforcing the policy in section 1362 against shifting to the government the expense of aliens' legal representation in deportation proceedings, this court held that excludable aliens are not entitled to representation in deportation proceedings, this court held that excludable aliens

are not entitled to representation at government expense in habeas corpus proceedings challenging denial of parole. Perez-Perez v. Hanberry, 781 F.2d 1477, 1480-81 (11th Cir.1986). Cases from this circuit in which attorney fees have been allowed under EAJA in immigration proceedings are distinguishable because they have not involved the specific facts of a deportation proceeding regarding a single alien. See, e.g., Jean v. Nelson, 863 F.2d 759 (This complex Haitian refugee litigation concerned basic constitutional issues regarding mass exclusion hearings, conducted without counsel, and detention of class members pending determination of their political asylum applications.); Haitian Refugee Center, 791 F.2d 1489 (Haitian class successfully challenged on due process and equal protection grounds INS accelerated processing of applications for asylum as unreasonable.). These cases involve attacks upon the INS program and not proceedings under the Act.

[6] If we were to allow attorney fee awards against the government in deportation proceedings, then we effectively would sanction a partial repeal of section 1362 by implication. Such a holding would

disregard sovereign immunity principles as well as authority advising against repeals by implication. Moreover, the different purposes of the Act and EAJA do not conflict. There has been no convincing showing in this case that Congress intended to repeal the bar of fee shifting in the Act or that EAJA and the Act are irreconcilable. See Radzanower, 426 U.S. at 154, 96 S.Ct. at 1992; United States v. Devall, 704 F.2d 1513, 1518 (11th Cir.1983). We find no "positive repugnancy" between EAJA and the Act regarding awarding attorney fees against the government so that "they cannot mutually coexist." Radzanower, 426 U.S. at 155, 96 S.Ct. at 1993. We, therefore, hold that the explicit bar on attorney fees against the government found in the Act is to be regarded as a narrow exception to the general provisions of EAJA and that partial repeal of section 1362 by implication is unwarranted to achieve the broad purposes of EAJA.

This holding also eliminates subject matter jurisdiction. Where express statutory preclusion occurs, another statute may not be used to circumvent that exception and, in this case, subject matter juridiction is lost. See Rhodes v. United States, 760

F.2d 1180, 1183 (11th Cir.1985)(In concluding that subject matter jurisdiction did not exist, this court found that the APA "excludes cases where liability is precluded expressly or by implication, so it says nothing to bypass express or implied preclusion in other law, and confers no jurisdiction to do so." (citing Califano v. Sanders, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977))); see also Laborers Local 938 Joint Health & Welfare Trust Fund v. B.R. Starnes Co., 827 F.2d 1454, 1456-57 (11th Cir.1987)(per curiam)(In a statutory, definitional interpretation, this court found that nonsignatory subcontractors and sureties were not "employers" under ERISA, thereby precluding federal subject matter jurisdiction over claims against nonsignatories for signatory's failure to make contributions to employee benefit plans.). "[L]ack of subject matter jurisdiction ... requires dismissal on the court's own motion if not raised by the parties." Lipofsky v. New York State Workers Compensation Bd., 861 F.2d 1257, 1258 (11th Cir. 1988); see Fed.R.Civ.P. 12(h)(3).

We reiterate that we are not reviewing this case factually, but legally. We also stress the narrowness

of our holding. Ardestani obtained the asylum relief that she sought. We simply find no statutory basis for her requested award of attorney fees against the government under EAJA, as discussed herein. Accordingly, we conclude that subject matter jurisdiction is lacking and that the Board of Immigration Appeals correctly found that the immigration judge had no statutory authority to award attorney fees to Ardestani. We AFFIRM.

PITTMAN, Senior District Judge, dissenting:

I dissent from the majority's holding and would adopt the holding and rationale of Escobar Ruiz v. I.N.S., 838 F.2d 1020 (9th Cir.1988) (en banc), aff'g, 813 F.2d 283 (9th Cir.1987). In my opinion, the majority's decision overlooks Congress' basic purpose in enacting the Equal Access to Justice Act (EAJA). EAJA provides for the payment of attorney fees arising out of an adversary adjudication before a government agency unless the government's position was substantially justified. See 5 U.S.C. § 504(a)(1).

In 1980, Congress enacted EAJA and, in 1985, reaffirmed and made permanent the provisions of the Act. The legislative history of the Act demonstrates

that the basic purpose of the Act was "to reduce the deterrents and disparity by entitling certain prevailing parties to recover an award of attorney fees, against the United States, unless the Government action was substantially justified." H.R.Rep. No. 1418, 96th Cong., 1st Sess. 4 (1985), reprinted in 1985 U.S. Code Cong. & Admin.News 132-33. This language evidences Congress' intent that a private party who prevails against unwarranted government action such as that exhibited in this case would be allowed to recover the funds expended to vindicate her rights. The facts of this case demonstrate the type of totally unjustified actions on the part of a government agency that Congress envisioned would be covered by EAJA. The Appellee, INS, denied the Appellant's request for political asylum and began deportation proceedings against the Appellant even though the INS knew that the State Department had termined that the Appellant had a well founded fear of persecution. This circuit in Jean v. Nelson, 863 F.2d 759 (11th Cir.1988), awarded attorney fees following challenged INS hearings under the EAJA. The three predicate findings necessary to award fees and expen-

ses under the EAJA set out in that case have been met in this case.

Section 504(a)(1) applies to "adversary adjudications" before a government agency. The statute defines an "adversary adjudication" as "an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license,..." 5 U.S.C. § 504(b)(1)(C). The legislative history of this section indicates that Congress intended an "adversary adjudication" to be defined as "an agency adjudication defined under the Administrative Procedures Act [section 554] where the agency takes a position through representation by counsel or otherwise." H.R.Conf.Rep. No. 1434, 96th Cong., 2d Sess.23(1980), reprinted in 1980 U.S.Code Cong. & Admin.News 5003, 5012.[1] An adversary adjudication

1. The majority's decision relies upon St. Louis Fuel & Supply Co. v. FERC, 890 F.2d 446, 449-51 (D.C.Cir.1989). In St. Louis Fuel & Supply Co., the court examined the language of section 504(b)(1)(C) and determined that the above quoted legislative history did not support the proposition that adversary

"defined under" section 554 is an adjudication "required by statute to be determined on the record after opportunity for an agency hearing, ..." 5 U.S.C. § 554(a). See Smedberg Machine & Tool, Inc. v. Donovan, 730 F.2d 1089, 1092 (7th Cir.1984); Cornella v. Schweiker, 728 F.2d 978, 988 (8th Cir.1984). The deportation proceedings instituted by the Appellee were required by statute and "made only upon a record in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, ..." 8 U.S.C. § 1252(b). The deportation proceedings fall squarely within the definition of an "adversary adjudication" defined under section 554 and are therefore covered by EAJA.

This construction of EAJA is consistent with the recommendations of the Administrative Conference of the United States (ACUS). In drafting model rules to

adjudications not governed by the APA were subject to the provisions of EAJA. St. Louis Fuel & Supply Co., 890 F.2d at 450. The court's rationale was that the version of the Act passed by the Senate contained the language "subject to" instead of "under" and that the House Judiciary Committee's Report indicated that "under" meant "subject to." Id. This conclusion ignores the plain language "defined under the Administrative Procedure Act" contained in the legislative history of section 504(b)(1)(C).

be used by administrative agencies in implementing EAJA, ACUS stated that "considering the purposes of the Equal Access to Justice Act, questions of its coverage should turn on substance-the fact that a party has endured the burden and expense of a formal hearing-rather than technicalities." 46 Fed. Reg.32,901 (1981). The position taken by the majority contradicts this language because the decision focuses on the technicality of "under section 554" instead of examining the substance of the deportation proceedings which clearly fall within the definition of an "adversary adjudication" contained within section 554.

The majority's opinion relies heavily on Marcello v. Bonds, 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107 (1955). I disagree with the majority's application of Marcello to this case. Marcello states, "[e]xemptions from the terms of the Administrative Procedure Act are not lightly to be presumed..." and then restricted its decision and departure to the procedure for deportation hearings. Marcello, 349 U.S. at 310. 75 S.Ct. at 726 (emphasis added). The court then stated, "the present statute expressly supercedes the hearing provisions of that Act." Id. (emphasis added). Never-

theless, the deportation proceedings are agency adjudications of the type defined under section 554. Therefore, the Supreme Court's decision in Marcello is not inconsistent with the Ninth Circuit's decision in Escobar Ruiz. Escobar addressed Marcello's treatment of the issue of whether deportation proceedings were subject to the hearing provisions of the APA.

Finally, the recovery of attorney fees pursuant to EAJA is not in conflict with nor precluded by section 292 of the Immigration and Nationality Act.[2] Section 292 is designed to prevent the appointment of counsel for indigent aliens in the process of exclusion or deportation proceedings. See generally, Perez-Perez v. Hanberry, 781 F.2d 1477 (11th Cir. 1986). This provision does not conflict with EAJA which only allows recovery by a prevailing party when the government's actions are without substantial justification. The legislative history of section 292

2. Section 292 provides that:
[i]n any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings. 8 U.S.C. § 1362

does not clearly demonstrate that the section was intended as a complete and total bar to the collection of fees in deportation proceedings. See H.R. Rep. No. 1365, 82nd Cong. 2d Sess. (1952), reprinted in 1952 U.S.Code Cong. & Admin.News 1653, 1712.

Where the legislative history is such, as here, that it can be persuasively construed to support two conflicting views between persons of good faith, it appears to me that the court should look to the broad purposes and intent of the statute to grant attorney fees and expenses rather than strangle the law's purpose by a hypercritical interpretation and application of the law.

For these reason, I dissent from the majority's holding.

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-8458

RAFEH RAFIE ARDESTANI, Petitioner,

versus

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the Immigration and Naturalization Service

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion July 6, 1990, 11th Cir., 198__, F.2d___).
(September 5, 1990)

Before: FAY, Circuit Judge, RONEY*, Senior Circuit Judge, and PITTMAN**, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Peter Fay
UNITED STATES CIRCUIT JUDGE

* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.
** Honorable Virgil Pittman, U.S. Senior District Judge for the Southern District of Alabama, sitting by designation.

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A26 591 156 - Atlanta Date: May 12 1989

In re: RAFEH RAFIE ARDESTANI

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Carolyn F. Soloway, Esquire
David N. Soloway, Esquire
Duncan Square, Suite 203-A
1961 North Druid Hills Road
Atlanta, Georgia 30360

ON BEHALF OF SERVICE: Terry C. Bird
District Counsel

APPLICATION: Attorney fees under the EAJA

This matter arises as a result of deportation proceedings held within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, but solely concerns the respondent's application for attorney fees and costs pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 (the "EAJA"). By decision dated January 27, 1989, the immigration judge ordered that the application for fees and costs be granted in the amount of $1,071.85. The Immigration and Naturalization Service appeals from this decision.

For the reasons set forth below, the decision of the immigration judge granting the application for fees and costs is vacated and the application for such fees and costs is denied. The request for oral argument is denied.

In his January 27, 1989, decision, the immigration judge initially concluded that deportation proceedings are within the scope of the EAJA. While we do not agree with the immigration judge's conclusion in this regard, there is a more fundamental reason we find that the immigration judge's decision must be vacated. See Matter of Anselmo, Interim Decision 3105 (BIA 1989).

The Board and immigration judges (except as provided by statute) only have such authority as is created and delegated by the Attorney General. 1/ See section 103 of the Immigration and Nationality Act

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1/ Even the specific grants of statutory authority to immigration judges in the Act (i.e., to conduct exclusion and deportation proceedings) are subject to limitations. For example, exclusion proceedings must be conducted in accordance with sections 235, 236, 287(b) of the Act, 8 U.S.C. §§ 1225, 1226, and 1357(b), and "such regulations as the Attorney General shall prescribe." In deportation proceedings, the immigration judge may only make determinations

(continued on next page)

(the "Act"), 8 U.S.C. § 1103; 28 U.S.C. §§ 503, 509 and 510. Under section 103(a) of the Act, the Attorney General has the authority to issue regulations and his determinations with respect to all questions of law are controlling. A regulation promulgated by the Attorney General has the force and effect of law as to this Board and immigration judges and neither has any authority to consider challenges to regulations implemented by the Attorney General, any more than there is authority to consider constitutional challenges to the laws we administer. See sections 103(a), 236(a), and 242(b) of the Act, 8 U.S.C. §§ 1103(a), 1226(a), and 1252(b); 8 C.F.R. § 3.0; 28 C.F.R. Part 24; Matter of Medina, Interim Decision 3078 (BIA 1988); Matter of Valdovino, 18 I&N Dec. 343 (BIA 1982); Matter of Bilbao-Bastida, 11 I&N Dec. 615 (BIA 1966), aff'd Bilbao Bastida v. INS, 409 F.2d 820 (9th Cir. 1969), cert. dismissed, 396 U.S.

1/ (Continued)

"as authorized by the Attorney General" and the proceedings themselves must "be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe."

802 (1969); Matter of Tzimas, 10I&N Dec. 101 (BIA 1962).

The Attorney General has determined that immigration proceedings do not come within the scope of the EAJA. See 28 C.F.R. § 24.103. See also 46 Fed. Reg. 48921, 48922 (Oct. 5, 1981)(interim rule with request for public comment). 2/ Neither this Board nor an immigration judge has authority to consider a challenge to the Attorney General's determination in this regard. Thus, absent a regulatory change or controlling court order, an immigration judge has no authority under law or regulation to consider an application for attorney fees under the provisions of the EAJA. The United States Court of Appeals for the Ninth Circuit has held en banc that

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2/ The supplemental information published with the 1981 interim rule made clear that the omission of deportation and exclusion proceedings from the rule was intentional. None of the three comments received, including the "extensive comments" from the Administrative Conference of the United States, addressed the specific statement that the EAJA did not apply to deportation and exclusion hearings or commented on the express language of 28 C.F.R. § 24.103 ("adversary adjudications required by statute to be conducted by the Department under 5 U.S.C. 554"). See 47 Fed. Reg. 15774 (1982)("Supplementary Information").

the EAJA does apply to deportation hearings before the immigration judges and the Board. Escobar Ruiz v. INS, 838 F.2d 1020 (9th Cir. 1988). But cf. Owens v. Brock, 860 F.2d 1363 (6th Cir. 1988). However, authority from one circuit is not binding in another. Georgia Dep't of Med. Assistance v. Bowen, 846 F.2d 708, 710 (11th Cir. 1988); Generali v. D'Amico, 766 F.2d 485, 489 (11th Cir. 1985).

Accordingly, in view of the controlling Departamental regulations, we find that the immigration judge in this case had no authority to consider an application for attorney fees and costs under the EAJA. Therefore, the January 27, 1989, decision of the immigration judge will be vacated and the respondent's application for attorney fees and costs under the EAJA will be denied.

ORDER: The January 27, 1989, decision of the immigration judge granting respondent's application for attorney fees and costs in the amount of $1,071.85 is vacated and the application for fees and costs under the EAJA is denied.

/s/ David L. Milhollan
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE IMMIGRATION JUDGE

ATLANTA, GEORGIA

In the Matter of	)	
	)	
Rafeh Rafie Ardestani	)	
	)	IN DEPORTATION PROCEEDINGS
A26 591 156	)	
	)	
Respondent	)	

The respondent is a native and citizen of Iran who last entered the United States at Chicago on December 14, 1982 as a visitor and was authorized to remain until May 30, 1984. At her hearing on October 23, 1986, she admitted to the allegations and was found deportable under section 241(a)(2) of the Act.

As relief from deportation, she requested asylum, or in the alternative, withholding of deportation. The basis for her fear of return to Iran was that she was a member of the Bahai faith. Entered into evidence was an opinion letter from the Department of State wherein it opined that she had a well-founded fear of persecution in Iran. This letter had been sent to the district director and he denied her application on February 12, 1986. The denial letter indicates that she had found refuge in Luxembourg

because she had been granted residence there. In a letter to the district director on February 17, 1986, counsel for the respondent set out facts which established that she has not 'resided' in Luxembourg. Instead of reconsidering the decision, the district director issued an Order to Show Cause on March 31, 1986. At her hearing, she presented these same facts and was granted asylum. The Service did not appeal.

The respondent has filed a request for attorney fees under the Equal Access to Justice Act (EAJA). She seeks this award arguing that she was the prevailing party and that the Service's litigation position was not substantially justified.

The EAJA provides for awards for attorney fees in adjudicatory proceedings before administrative agencies. The statute provides [5 U.S.C. section 504(a)(1) (1982 and Supp. III 1985)]:

> An agency that conducts an adversary adjudication shall award to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or the special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made

in the adversary adjudication for which fees and other expenses are sought. 1/

The purpose of the EAJA is to insure that covered individuals and entities "will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved in securing the vindication of their rights. "2/ The court in Escobar Ruiz v. INS, 838 F.2d 1020 (C.A. 9 1988), held that immigration hearings are adversarial adjudications and covered by the EAJA.

If the respondent is the prevailing party, it must be determined whether the Service's litigating position was substantially justified. In Nunes-Correia v. Haig, 543 F. Supp. 812 (D.D.C. 1982), the court held that "substantial justification" is an "acceptable middle ground" between automatic awards and awards made only where government action was "arbitrary, frivolous, unreasonable, or groundless, or

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1/ Added October 21, 1980, Public Law 96-481, Title 11, section 203(a)(1); as amended, Public Law 99-80, section 1 August 5, 1985.

2/ House Rept. No. 99-120, Part 1, 99th Cong. 1st Sess. [Pub. L. 99-80] pp. 4, 13, & 18 (1985).

the United States continued to litigate after it became so." Id at 817. Moreover, the mere absence of bad faith or absence of deliberate abuse of legal process is not enough to avoid an award of fees and expenses.

In Gavette v. OPM, 785 F.2d 1568 (Fed. Cir. 1986), the court held the government in showing its position was substantially justified must show that "it was clearly reasonable" in asserting its position. Id at 1579 (Emphasis in original). Further, the government must show that it has not "pressed a tenuous factual or legal position, albeit one not wholly with foundation."3/ It is not sufficient for the government to show merely "the existence of a colorable legal basis" for its case. The EAJA's legislative history states that the mere fact that the government's position was reasonable does not mean it

3/ The EAJA's legislative history indicates it is "intended to caution agencies to carefully evaluate their case and not pursue those which are weak or tenuous." House Rept. No. 96-1418, 2nd Sess. p. 54 (1980).

Sess. p. 9 (1985).

was substantially justified.4/

The EAJA provides that agencies are to establish uniform procedures for the submission and consideration of applications for attorney fees and costs. The Department of Justice has established these procedures 2at 28 C.F.R. Part 24. In issuing these regulations it stated that deportation and exclusion proceedings were not covered by the EAJA, 46 Fed. Reg. 48,922 (Oct. 5, 1981). However, this assertion has been rejected by the court in Escobar Ruiz, supra.

Applications must be filed no later than thirty days after final disposition of the proceedings. 28 C.F.R. section 24.204. This application was filed on November 20, 1986, within the required period and is timely filed.

Under the EAJA the burden is on the Service to show that its position was substantially justified and why an award should not be made. Charter Management, Inc. v. NLRB, 768 F.2d 1299 (C.A. 11 1985); and see, 47 Fed. Reg. 15,775.

4/ House Rept. No. 99-120, Part 1, 99th Cong. 1st Sess. p. 9 (1985).

The respondent has requested attorney fees arguing that she prevailed when she was granted asylum. Quite clearly she is correct. I note that the Service has not filed an opposition to the request; but even if it had, it could not establish that its litigating position was justified. Prior to the issuance of the Order to Show Cause, she had provided information to the Service that she had not established residence in Luxembourg. The Service had ample opportunity to examine whether the information was true prior to issuing the Order to Show Cause. Further, on April 10, 1986, prior to the filing of the Order to Show Cause with this office, counsel again wrote to the district director requesting to resolve the matter before a hearing was scheduled.

To prevail here, the Service must prove that its position was "solid though not necessarily correct in fact and law." McDonald v. Schweiker, 726 F.2d 311, 316 (C.A.7 1983). And, that the Service's position made the issue a close call even though it lost. Ulrich v. Schweiker, 548 F. Supp. 63 (D. Idaho 1982). The Service has provided nothing in support of its position. Moreover, it is highly unlikely that

anything it might have provided could have caused it to prevail here.

Counsel for the respondent has filed a detailed request for fees based upon fourteen hours of work. I note that the fractional hours provided for each task do not total fourteen. But, fractional hours are not provided for work done after October 23, 1986. The additional 2.1 hours apparently is for time spent on the EAJA request and this is allowed. See, Haitian-Refugee Center v. Meese, 791 F.2d 1489 (C.A. 11 1986). Time spent on work from October 14, 1985 until February 17, 1986 must be denied as it predates the issuance of the Order to Show Cause. The request for fees at the rate of $90 per hour is reasonable when adjustment for the cost of living is made. Also, costs will be allowed.

ORDER: IT IS HEREBY ORDERED that the application for attorney fees is granted in the amount of $1,071.85.

January 27, 1989

/s/ Charles E. Auslander, Jr.
Charles E. Auslander, Jr.
Immigration Judge

(2)

90-1141

In the Supreme Court of the United States

OCTOBER TERM, 1990

RAFEH-RAFIE ARDESTANI, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
WILLIAM KANTER
JOHN S. KOPPEL
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QUESTION PRESENTED

Whether the Equal Access to Justice Act, 28 U.S.C. 2412(d)(3) and 5 U.S.C. 504(a)(1), authorizes the award of attorneys fees and expenses for an administrative deportation proceeding before the Immigration and Naturalization Service.

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TABLE OF AUTHORITIES

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OCTOBER TERM, 1990

No. 90-1141

RAFEH-RAFIE ARDESTANI, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A40) is reported at 904 F.2d 1505. The opinion of the Board of Immigration Appeals (Pet. App. A43-A47) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1990. A petition for rehearing was denied on September 5, 1990. Pet. App. A41-A42. The petition for a writ of certiorari was filed on December 3, 1990. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, an Iranian citizen, entered the United States as a visitor in December 1982. She remained in this country lawfully until the end of May 1984, and then sought

political asylum. The Immigration and Naturalization Service (INS) denied her application and issued an order to show cause why she should not be deported. Petitioner conceded her deportability, but renewed her asylum application. The immigration judge granted her request for asylum, and INS did not seek further administrative review. Pet. App. A4-A7.

Petitioner subsequently filed an application for attorneys fees and expenses, asserting jurisdiction under the Equal Access to Justice Act (EAJA), 5 U.S.C. 504(a)(1). Pet. App. A7. The immigration judge found petitioner entitled to fees under EAJA, and awarded fees in the amount of $1,071.85. *Ibid.* INS appealed the fee award to the Board of Immigration Appeals (BIA), which held that EAJA does not apply to administrative deportation proceedings, relying upon a regulation to this effect promulgated by the Attorney General. *Id.* at A43-A47; see 28 C.F.R. 24.103.

Petitioner sought review in the court of appeals of the BIA holding. See 5 U.S.C. 504(c)(2). The Eleventh Circuit affirmed, with Senior District Judge Pittman (sitting by designation) dissenting. Pet. App. A1-A40. The panel majority held that an administrative deportation proceeding is not an "adversary adjudication" as that term is defined in 5 U.S.C. 504(b)(1)(C), because it is not "an adjudication under [5 U.S.C.] section 554." Agreeing with three other circuits,[1] the majority held that "under section 554" means "governed by" or "subject to" Section 554—*i.e.*, the Administrative Procedure Act (APA). Pet. App. A19. But the procedures prescribed in Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252—not the procedures of the

[1] See *Clarke* v. *INS*, 904 F.2d 172 (3d Cir. 1990); *St. Louis Fuel & Supply Co.* v. *FERC*, 890 F.2d 446 (D.C. Cir. 1989); *Owens* v. *Brock*, 860 F.2d 1363 (6th Cir. 1988). Contra *Escobar Ruiz* v. *INS*, 838 F.2d 1020 (9th Cir. 1988).

APA—govern deportation proceedings. *Marcello* v. *Bonds*, 349 U.S. 302 (1955). Because Section 554 has no application, a deportation proceeding is not an "adversary adjudication" for which EAJA fees may be awarded. Pet. App. A19-A22. Judge Pittman agreed with the holding and reasoning of *Escobar Ruiz* v. *INS*, 838 F.2d 1020 (9th Cir. 1988). See Pet. App. A34-A40.

ARGUMENT

The petition for a writ of certiorari should be granted. Although the decision of the court of appeals is correct, it squarely conflicts with the decision of the Ninth Circuit in *Escobar Ruiz* v. *INS*, *supra*, and review by this Court is warranted to establish uniformity among the circuits on the question of the applicability of EAJA to INS administrative deportation proceedings.[2] In addition, a decision by this Court will provide guidance on the scope of the EAJA definition of "adversary adjudication" in Section 504(b)(1)(C), which will assist in determining whether EAJA fees are available for other administrative proceedings conducted pursuant to statutes that mandate procedures that are similar to those required by the APA.

The Eleventh Circuit properly rejected the holding and the reasoning of *Escobar Ruiz*, as has the Third Circuit in *Clarke* v. *INS*, 904 F.2d 172 (1990), another recent decision dealing with the issue of the applicability of EAJA to INS administrative deportation proceedings. Similarly, two other Circuits have rejected the reasoning of *Escobar*

[2] The Solicitor General has recently filed a petition for certiorari in *Immigration and Naturalization Service* v. *Rivas*, No. 90-1223, a case in which the Ninth Circuit followed its *Escobar Ruiz* holding. We suggested that the Court hold *Rivas* pending its disposition of the instant case.

Ruiz with respect to the meaning of the EAJA definition of "adversary adjudication." See *St. Louis Fuel & Supply Co.* v. *FERC*, 890 F.2d 446, 449-451 (D.C. Cir. 1989) (holding that certain FERC administrative proceedings are not covered by EAJA); *Owens* v. *Brock*, 860 F.2d 1363, 1365-1366 (6th Cir. 1988) (holding that EAJA does not apply to Federal Employees Compensation Act proceedings).

As the court below and the Third, Sixth and D.C. Circuits have recognized, *Escobar Ruiz* misinterpreted the legislative history of EAJA and ignored the principle that a waiver of sovereign immunity must be construed strictly in favor of the sovereign. Pet. App. A11-A27; *Clarke*, 904 F.2d at 173-178; *Owens*, 860 F.2d at 1365-1366; *St. Louis Fuel & Supply Co.*, 890 F.2d at 449-451. Moreover, as both the court of appeals in the instant case and the Third Circuit in *Clarke* observed, specific provisions of the Immigration and Nationality Act also bar fee awards for the administrative proceedings in question, and EAJA has not repealed these provisions. Pet. App. A26-A32; *Clarke*, 904 F.2d at 177. Thus, the court in the case at bar correctly declined to follow *Escobar Ruiz*. In light of the disagreement among the circuits on the significant, recurring question of the scope of the EAJA definition of an "adversary adjudication," however, review by the Court is warranted in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
WILLIAM KANTER
JOHN S. KOPPEL
Attorneys

FEBRUARY 1991

U.S. GOVERNMENT PRINTING OFFICE: 1991 282 061/20369

No. 90-1141

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RAFEH-RAFIE ARDESTANI, Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR

THE ELEVENTH CIRCUIT

MOTION TO DISPENSE WITH FILING OF JOINT APPENDIX

DAVID N. SOLOWAY
Counsel of Record

CAROLYN F. SOLOWAY
Counsel for Petitioner

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Atlanta, Georgia 30345
(404) 320-7000

COMES NOW, Rafeh-Rafie Ardestani ("Petitioner") and pursuant to Rule 26.7 of the United States Supreme Court Rules, moves to dispense with the filing of the Joint Appendix and shows this Court the following:

1.

On December 3, 1990, Petitioner filed a Petition for Writ of Certiorari in the above-identified case. Included in the Petition was the Opinion and Judgment of the Court of Appeals for the Eleventh Circuit dated July 6, 1990 (Pet. Writ A1), the Denial of Petitioner's Petition for Rehearing and Suggestion of Rehearing En Banc dated September 5, 1990 (Pet. Writ A15); the Opinion and Judgment of the Board of Immigration Appeals dated May 12, 1989 (Pet. Writ A17); and the Opinion and Judgment of the Immigration Court dated January 27, 1989 (Pet. Writ A22).

2.

On March 4, 1991, this Court granted Petitioner's Petition for Writ of Certiorari in the above-identified case.

3.

In a April 24, 1991 telephone discussion between counsel for Petitioner and Respondent, an agreement was reached between counsel that there was nothing in the record, apart from the opinions and judgments from the Courts below (printed in the Appendix of Petitioner's Petition for Writ of Certiorari), that needed to be reprinted in the Joint Appendix to illuminate the issues involved on appeal.

4.

Requiring the production of a Joint Appendix in accordance with Rule 26 of the United States Supreme Court Rules would only duplicate what already has been produced to the Court in the Appendix to Petitioner's Petition for Writ of Certiorari, and would serve no purpose for the Court or the parties.

WHEREFORE, Petitioner requests that this Court by order dispense with the requirement of a Joint Appendix and permit this case to be heard on the original record from the Eleventh Circuit Court of Appeals and the Appendix contained in Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

David N. Soloway
Counsel of Record

Carolyn Frazier Soloway
Counsel for Petitioner

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1800 Century Place, Suite 100
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(404) 320-7000

April 24, 1991

CERTIFICATE OF SERVICE

I, David N. Soloway, a member of the Bar of this Court, hereby certify that on this 24th day of April, 1991, three true copies of the foregoing Petition for Writ of Certiorari were mailed, first class postage prepaid, to the following:

Kenneth W. Starr, Esq.
Solicitor General
Department of Justice
Washington, D.C. 20530

I hereby certify that all parties required to be served have been served.

DAVID N. SOLOWAY
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Atlanta, Georgia 30345
404/320-7000
Counsel of Record

April 24, 1991

(3)

No. 90-1141

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RAFEH-RAFIE ARDESTANI, Petitioner,

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UNITED STATES DEPARTMENT OF JUSTICE,
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ON WRIT OF CERTIORARI TO
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BRIEF FOR PETITIONER

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(404) 320-7000

May 1, 1991

QUESTION PRESENTED

May the United States government avoid payment of attorney's fees under the Equal Access to Justice Act in deportation proceedings before immigration judges, instituted and prosecuted by the government without legal justification, solely because such proceedings are defined by, but not governed by, the Administrative Procedure Act?

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No. 90-1141

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RAFEH-RAFIE ARDESTANI, Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the Eleventh Circuit dated July 6, 1990, including the dissenting opinion of Hon. Virgil Pittman (Pet.App. A1), is reported at 904 F.2d 1505 (11th Cir. 1990).

The Order denying Petitioner's Petition for Rehearing and Suggestion of Rehearing *En Banc* dated September 5, 1990 (Pet.App. A41) is reported at 915 F.2d 698 (11th Cir. 1990).

The opinion and judgment of the Board of Immigration Appeals dated May 12, 1989 (Pet.App. A43) is not reported.

The opinion and judgment of the Immigration Court dated January 27, 1989 (Pet.App. A48) is not reported.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals (Pet.App. A1) was entered on July 6, 1990. A Petition for Rehearing and Suggestion of Rehearing *En Banc* was denied on September 5, 1990 (Pet.App. A41).

A Petition for a Writ of Certiorari was filed on December 3, 1990 and was granted on March 4, 1991.

The jurisdiction of this Court is based upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

5 U.S.C. § 504. The full text of this statute is set forth in the Petition for Writ of Certiorari at pp. 3-7. The portions of § 504 most relevant to this case are as follows:

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the

adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust....

(b)(1) For the purposes of this section -

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise....

5 U.S.C. § 554. Adjudications. The portion of § 554 most relevant to this case is as follows:

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved-

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

STATEMENT OF THE CASE

This case involves the award of attorney's fees, pursuant to the Equal Access to Justice Act ("EAJA"), against the United States Department of Justice, Immigration and Naturalization Service ("INS") for its unjustified denial of asylum to Rafeh Rafie-Ardestani ("Petitioner"). That denial resulted in Petitioner being forced to fight her deportation in a contested deportation hearing before an immigration judge. The Immigration Court ruled in favor of the Petitioner; ruled that INS's litigation position had lacked substantial justification; and awarded attorney's fees to Petitioner under EAJA. The Board of Immigration Appeals ("BIA") reversed the attorney fee award, holding that EAJA did not apply to immigration deportation proceedings. In a divided opinion, the Eleventh Circuit Court of Appeals upheld the BIA decision.

On July 9, 1984, Petitioner, then a sixty-two year old woman of the Bahai faith, filed an application for asylum in the United States based upon her well-founded fear of persecution if she were forced to return to her native country of Iran (R. 105-109). On November 5, 1984, the United States Department of State, Office of Asylum Affairs, Bureau of Human Rights and Humanitarian Affairs determined that Petitioner had shown a "well-founded fear of persecution upon return to Iran." (R. 110). Despite this recommendation, on February 12, 1986 INS denied Petitioner's asylum application, based upon the unwarranted assertion that Petitioner had reached a "safe

haven" in Luxembourg and had established residence there. (R. 80-81).[1]

Counsel for Petitioner wrote to INS to advise that Petitioner had been in Luxembourg for only three days (as evidenced by her passport), for the sole purpose of visiting the United States Consul pending her travel to the United States. INS was further advised that during her brief stay in Luxembourg, Petitioner stayed in a hotel and at no time applied for residency in Luxembourg. (R. 82). Despite this letter, INS did not revoke its denial of asylum, but instead issued an Order to Show Cause against Petitioner, charging her with impermissibly remaining in the United States (R. 103). Counsel for Petitioner sent INS two additional letters reiterating the salient facts (R. 83-84, 85); INS ignored both letters, and continued with deportation proceedings against Petitioner. (R. 120-121).

At the hearing, Petitioner renewed her request for asylum. Petitioner's passport, introduced into evidence, revealed that Petitioner thrice had been examined by INS: (1) at her Port of Entry into the United States; (2) at the interview on her asylum application; and (3) prior to the issuance of an Order to Show Cause (when INS received a copy of Petitioner's passport that showed that she had been out of Iran for less than one month prior to entry into the United States, and that she had not received a visa

[1] Asylum in the United States is not available to one who has firmly resettled in a third country before entering the United States. 8 U.S.C. 1157(c)(1); 8 C.F.R. 208.8(f)(1)(ii). An alien is considered "firmly resettled" if he was offered resident status, citizenship status, or some other type of permanent resettlement by another nation and travelled to and entered that nation as a consequence of his flight from persecution. 8 C.F.R. § 208.14.

or grant of residency from Luxembourg). (R. 105-109, 111-119). INS presented no contrary evidence whatsoever; yet without any evidence that Petitioner had established residence in Luxembourg, INS steadfastly persisted in its unwarranted position.

The Immigration Judge rejected the position of the INS, and on October 23, 1986, Petitioner was granted asylum by the Immigration Court (R. 102). The INS did not appeal this decision. (R. 61).

Petitioner filed an application for Attorney's fees under EAJA (R. 71-96). The application stated that the position of the INS in denying Petitioner's asylum claim and in pursuing the same position before the Immigration Court had not been substantially justified. *See* 5 U.S.C. § 504(a)(1). The INS did not respond to Petitioner's application. (R. 64).

On January 27, 1989, the Immigration Court awarded Petitioner $1,071.85 in attorney's fees. (R. 61-65; Pet.App. A48). In its Order, the Immigration Court held that EAJA was available to an alien in an immigration deportation proceeding and that Petitioner was a prevailing party. (R. 61-65; Pet.App. A48). Additionally, the Immigration Court stated that:

> [Petitioner] has requested attorney fees arguing that she prevailed when she was granted asylum. Quite clearly she is correct. I note that the Service has not filed an opposition to the request [for attorney's fees]; but even if it had, it could not establish that its litigating position was justified. Prior to the issuance of the Order to Show Cause, she had provided information to the Service that she had not established residence in Luxembourg. The

> Service had ample opportunity to examine whether the information was true prior to issuing the Order to Show Cause. Further, on April 10, 1986, prior to the filing of the Order to Show Cause with this office, counsel again wrote to the district director requesting to resolve the matter before a hearing was scheduled....
>
> The Service has provided nothing in support of its position. Moreover, it is highly unlikely that anything it might have provided could have caused it to prevail here. (R. 64; Pet.App. A53-54).

Despite its failure to respond to Petitioner's fee application, INS appealed the decision of the Immigration Court to the Board of Immigration Appeals ("BIA"). (R. 5-23, 97-98). The BIA issued a decision that did not explicitly focus upon the applicability of EAJA to deportation proceedings (R. 1-4; Pet.App. A43), but ruled that regulations issued by the United States Attorney General (under whose authority the INS and the BIA operate) did not grant authority to an Immigration Court to consider an EAJA application (R. 1-4; Pet.App. A43). The BIA noted that its conclusion was contrary to *Escobar-Ruiz v. INS*, 838 F.2d 1020 (9th Cir. 1988) (*en banc*), and vacated the decision of the Immigration Court. (R. 1-4; Pet.App. A43).

Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit (R. 5-23, 97-98). The Court of Appeals, in a divided decision, rejected the holding of *Escobar-Ruiz v. INS, supra*, and held that the EAJA attorney fees provisions do not apply to such deportation proceedings (Pet.App. A1-34). In his dissenting opinion, Judge Pittman strongly urged adoption of the holding and rationale of *Escobar-Ruiz* so as not to

frustrate Congress's basic purposes in enacting EAJA (Pet.App. A34-40). He concluded that the facts of this case demonstrate the very unjustified government agency action that Congress envisioned would be covered by EAJA (Pet.App. A35).

SUMMARY OF ARGUMENT

The Equal Access to Justice Act ("EAJA") allows recovery of attorney's fees by individuals who prevail in "adversary adjudications" before administrative agencies when the position of the government is not substantially justified. EAJA defines an adversary adjudication as an adjudication "under Section 554" of the Administrative Procedure Act ("A.P.A."). Immigration deportation proceedings are within the ambit of the EAJA.

Deportation proceedings subject a person to the most severe sanctions imposed by an administrative agency. At risk, especially for persons claiming entitlement to asylum, may be "all that makes life worth living." Deportation proceedings are initiated by the Immigration and Naturalization Service ("INS") through a formal Order to Show Cause, notifying of reasons for deportation, and an alien must formally plead in response. Deportation proceedings are heard by an immigration judge of the Executive Office of Immigration Review, where deportability is determined by an adjudication on the record after a hearing. The INS is represented by counsel, and formal procedures exist for the calling of witnesses and the conduct of the hearing. Applicable statutes and regulations are extraordinarily complex.

By its terms, Section 554(a) of the A.P.A. "applies ... in every case of adjudication required by statute to be determined on the record after opportunity for an agency

hearing [except in six enumerated instances]." The Immigration and Nationality Act ("I.N.A.") requires that all adjudications made by Immigration Judges in deportation hearings be made on the record after an opportunity for a full hearing, and deportation hearings do not fall within any of the exceptions. The absence of deportation hearings in the enumerated exemptions is significant, and means that they were not intended to be exempted. Section 554 applies to deportation proceedings, and the EAJA, in turn, is applicable to those proceedings. No further inquiry is needed.

Should the Court, however, determine that even in the absence of statutory language saying so, Section 554(a)'s broad terms ("every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing") are more limited, then the terms of 5 U.S.C. § 504(a)(1) are ambiguous, and require judicial construction of "under Section 554."

In the absence of legislative context, "'*under*' Section 554" may have numerous meanings, including "as defined by," "as governed by," etc. Judicial construction requires examination of EAJA's legislative history and purposes.

EAJA's legislative history demonstrates an intention for EAJA to apply in adjudications defined by Section 554: trial-like adjudications determined on the record after a hearing. This functional approach is supported by the terminology employed in the original conference report on EAJA. It is also supported by the criticism and rejection, during EAJA's legislative re-enactment, of narrow and hyper-technical judicial and agency interpretations. Congress' express confirmation of EAJA's applicability to Social Security cases, without resolving doubt about whether such cases are governed by the A.P.A., further

demonstrates Congress' intent that a functional approach - applying EAJA when the government is represented by counsel in a trial-like proceeding - is to be employed.

EAJA expressly requires agencies to consult with the Administrative Conference of the United States before promulgating rules for its implementation. The ACUS position consistently has urged agencies to adopt a broad interpretation of "adjudications under Section 554," so that EAJA's coverage would "turn on substance - the fact that the party has endured the burden and expense of a formal hearing - rather than technicalities."

In order to further, rather than frustrate, specific legislative goals, a functional interpretation of EAJA, one that applies to deportation proceedings, is necessary. EAJA was to serve the basic purposes of reducing the economic deterrents and disparity in resources presented to a private party subjected to unjustified government action; deterring unjustified government action; and encouraging litigation to help formulate public policy.

The INS's action in denying Petitioner's asylum claim and the position it took in litigation in Petitioner's deportation proceedings were unjustified. Despite three examinations of her passport, and three letters sent to the INS by her attorney, the INS denied the Petitioner's asylum application and subjected her to deportation proceedings based upon the erroneous claim that she had been "firmly resettled" (i.e. received resident or citizen status) in a third country. The Petitioner, persecuted in her native Iran for her religious beliefs, had stayed in a hotel in Luxembourg for only three days (as evidenced by her passport), for the sole purpose of visiting the United States Consul pending her travel to the United States.

As a result of this unjustified action by the INS, Petitioner was forced to shoulder the burden and expense of a deportation hearing, and to bear the trauma of facing deportation to a country where the Department of State had already concluded she was in sufficient danger of persecution to warrant a grant of asylum in this country. The EAJA was enacted precisely to compensate persons like Petitioner who are forced to defend themselves in court as a result of unjustified government action.

Deportation proceedings meet all of the elements of an "adversary adjudication" as defined in Section 554. The legislative purposes of EAJA are served by government accountability under EAJA. The INS should not be able to avoid payment of EAJA attorney's fees awarded by the immigration judge solely because deportation proceedings, though conforming to the requirements of the A.P.A., are not strictly governed by it.

Nor does Section 292 of the Immigration and Nationality Act, which parenthetically states that persons in deportation proceedings are not entitled to have government-appointed counsel, remove deportation proceedings from EAJA's coverage. That statute addresses the relationship between indigency and the right to counsel; EAJA is a fee-shifting statute invoked when the government's action is unjustified. The two statutes are not incompatible, and they are perfectly capable of co-existence. *Marcello v. Bonds*, which merely held that a specific portion of the I.N.S.'s hearing provisions (which used to, but no longer, differ from the A.P.A. with respect to the dual role permitted immigration judges) superceded the corresponding hearing provisions of the A.P.A., similarly does not permit the INS to escape EAJA accountability.

ARGUMENT

I. ATTORNEY FEE AWARDS ARE RECOVERABLE IN IMMIGRATION DEPORTATION PROCEEDINGS BECAUSE THEY ARE "ADVERSARY ADJUDICATIONS" UNDER THE EQUAL ACCESS TO JUSTICE ACT ("EAJA").

A. THE NATURE OF DEPORTATION PROCEEDINGS.

EAJA provides for the recovery of attorney's fees by private parties who prevail in "adversary adjudications" before federal administrative agencies in which the position of the government is not substantially justified. 5 U.S.C. § 504 (a)(1). Deportation proceedings are adversary adjudications under the EAJA.

Deportation proceedings visit upon people the most severe sanctions that may be imposed by an administrative agency. Deportation "is a drastic measure and at times the equivalent of banishment or exile." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). As Justice Brandeis recognized, deportation may result "in loss of both property and life, or of all that makes life worth living." *N.G. Fung Ho v. White*, 259 U.S. 276, 284 (1922). For those seeking asylum, such as Petitioner, the consequenses of deportation is most severe. "Deportation ... is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her own country." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).[2]

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[2] People with valid claims for political asylum, such as the Petitioner, are not the only persons subjected to deportation. Spouses of United States citizens (8 C.F.R. § 242.17(a)), or even

Those faced with deportation are confronted with a maze of detailed procedures and regulations in an adversary proceeding. Deportation proceedings are initiated by the INS through the issuance of an order to show cause, explaining why a person should be deported. 8 C.F.R. § 242.1(a). An alien is required to plead to the INS charges. 8 C.F.R. § 242.16(b). Deportation proceedings are heard before an immigration judge of the Executive Office of Immigration Review. 8 C.F.R. § 3.14(a). There, deportability is determined by an adjudication on the record after a hearing. I.N.A. § 242(b), 8 U.S.C. § 1252(b); 8 C.F.R. §§ 3.26, 3.34, 242.15. At the hearing, the INS is represented by counsel. 8 C.F.R. § 242.16(c). The alien has a right to examine evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the government. I.N.A. § 242(b), 8 U.S.C. § 1252(b). The immigration judge may issue subpoenas for depositions and for hearings. 8 C.F.R. §§ 3.33, 242.14(e).

Deportation proceedings are peculiarly complex. They require navigating "a baffling skein of provisions" resembling "King Mino's labyrinth in ancient Crete," *Loc v. INS*, 548 F.2d 37, 38 (2d Cir. 1977), and to address laws which "have been termed 'second only to the Internal Revenue Code in complexity.'" (citation omitted) *Castro-O'Ryan v. Dept. of Immigration and Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1988). *See also, Dong Sik Kwon v. INS*, 646 F.2d 909, 919 (5th Cir. 1981).

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nationals of the United States and those immediately eligible for naturalization (8 C.F.R. § 242.7(a)(1),(e)) may be subjected to deportation proceedings.

B. DEPORTATION PROCEEDINGS ARE DEFINED UNDER SECTION 554 OF THE ADMINISTRATIVE PROCEDURE ACT, AND THEREFORE ARE COVERED BY THE EAJA.

EAJA defines an adversary adjudication as "an adjudication under section 554 of this title in which the position of the United States is represented by counsel..." 5 U.S.C. § 504 (b)(1)(C). The INS concedes, as it must, that it was "represented by counsel" in this deportation proceeding. *See Escobar-Ruiz*, 838 F.2d at 1023 n.2.

Section 554(a) defines adjudications as "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." The statute then lists six exemptions. It is uncontroverted that Immigration statutes and regulations require adjudication on the record after a hearing has been conducted. I.N.A. § 242(b), 8 U.S.C. § 1252(b); 8 C.F.R. §§ 242.15-242.16. Section 554(a)'s definition is met in deportation proceedings. Section 554(a), governing the applicability of EAJA to cases such as deportation, does not demand that the statute requiring a hearing on the record be identical to Section 7 of the A.P.A., 4 U.S.C. § 556.

There also can be no question that the express exemptions to Section 554 are inapplicable to deportation proceedings. The common rule of statutory construction is that Congress knows how to include a category if it chooses to do so, and that its silence is controlling. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522-523 (1983). Section 554 applies to deportation proceedings, and the EAJA, in turn, is applicable to those proceedings. No further inquiry is needed.

In the event, however, that this Court determines that even in the absence of statutory language saying so, Section 554(a)'s broad terms ("every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing") are more limited, then the terms of 5 U.S.C § 504(a)(1) are ambiguous, and require judicial construction of "under Section 554."

Judicial construction, then, of the phrase "under Section 554" is pivotal in determining that the EAJA applies to deportation proceedings. The Court's duty in interpreting statutory language is to find that interpretation which most fairly is imbedded in the statute, and which fulfills the scheme and general purposes intended by Congress. *Commissioner v. Engle*, 464 U.S. 206 (1984).

"*Under* section 554," if not construed to mean literally "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing [except in six enumerated instances]," is ambiguous, and susceptible to multiple plausible constructions. There are as many as twenty-five different definitions of the preposition "under." *See 18 The Oxford English Dictionary 947-951* (2d ed. 1989). In some contexts, "under" can mean "defined by"; in others, it may mean "subject to" or "governed by." *Id.*[3]

[3] This Court, in a case quite similar to the case at bar, upheld an interpretation of the term "*under* applicable state law" that was flexibly interpreted according to its context. In *Mississippi River Fuel Corp. v. Slayton*, 359 F.2d 106 (8th Cir. 1966), the Court of Appeals held that the term applied not only to state statutes, but must be interpreted to include common law interpretations of contract provisions. The court stated: "'under' does not connote quite so strongly the specification of a statute but, rather, rights anbd duties measured by law generally." *Id.* at 119. Although reversed on other grounds, this Court specifically upheld the broad interpretation given to the term "under" by the Court of Appeals. *Levin v. Mississippi River Fuel Corp.*, 386 U.S. 162, 168 (1967). (the term "under applicable state law ... embraced all state law," not just state statutes.)

In Escobar-Ruiz, the Ninth Circuit looked to the EAJA's purposes, concluding that "under Section 554" means "as defined by Section 554." 838 F.2d at 1024; accord *Cornella v. Schweiker*, 728 F.2d 978, 988 (8th Cir. 1984). The court below, however, applied a wooden and highly technical interpretation to "under," concluding that "under Section 554" means "governed by Section 554." In doing so, it wholly ignored the critical fact that deportation proceedings before the Immigration Court are virtually identical to those defined by Section 554. *See* Pet.App. at A36-A39 (Pittman, J., dissenting). Because the statute is ambiguous, the Court must look to the EAJA's underlying purposes and history in construing the term. *See Commissioner v. Engle, supra.*

Statutory construction cannot be an inert exercise in grammar or literary composition (*Lynch v. Overholser* 369 U.S. 705, 710 (1962)); in order to glean the correct meaning of an ambiguous statutory term, the Court must look to the legislative history and purpose of the statute. *See: Blum v. Stenson* 465 U.S. 886, 896 (1984).[4] The

[4] Even if, *arguendo*, the controlling phrase "under Section 554" were plain and unambiguous on its face, the Court still should look at the legislative history if the plain meaning of the words is at variance with the policy of the statute as a whole. *United States v. American Trucking Association* 310 U.S. 534, 543-44 (1940). This is particularly true for statutory construction in a case of first impression. *United States v. Dadanian* 818 F.2d 1443, 1448 (9th Cir. 1987). The court should examine the legislative history "in order

legislative history of EAJA and the policy of the statute as a whole, mandate a conclusion that "*under* Section 554" includes proceedings "*defined by* Section 554," and that deportation proceedings are therefore within the ambit of the statute.

1. THE LEGISLATIVE HISTORY MANDATES A JUDICIAL CONSTRUCTION OF "UNDER SECTION 554" THAT ALLOWS THE EAJA TO REACH DEPORTATION PROCEEDINGS

The House Conference Committee report on EAJA, particularly probative because it presents the views of both the House and the Senate on H.R. 5612 (which eventually became the EAJA statute), expressly stated that the statute "defines adversary adjudication as an agency adjudication *defined under* the Administrative Procedures [sic] Act where the agency takes a position through representation by counsel or otherwise." H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess.23 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News, 5003, 5012 *(emphasis added)*. Reference to Section 554 was intended by Congress to differentiate between trial-like adjudications covered by the EAJA, and rule-making proceedings outside the scope of the EAJA, rather than differenciate between functionally (and to a large extent literally) identical adjudications according to the identification of the statute that technically authorized the adjudication.

Moreover, in the evolution of the statute, Congress substituted the words "an adjudication *under* section 554" in place of "an adjudication *subject to* section 554." *(emphasis added)*, H. Rep. No. 96-1418, 96th Cong. 2d. Sess. (1980),

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to determine whether literal application of the statute would 'pervert its manifest purpose.'" *Berger v. Heckler*, 771 F.2d 1556, 1571 (2d Cir. 1985) (quoting *United States v. Perdue Farms, Inc.*, 680 F.2d 277, 280 (2nd Cir. 1982).

reprinted in 1980 U.S. Code Cong. & Ad. News, 4984. This evidences Congress's intent not to require that a procedure directly be subject to that section.

A broad interpretation of "adversary adjudication" is supported not only by the legislative history, but also by the Administrative Conference of the United States ("ACUS"). *See* 46 Fed. Reg. 32,900 *et seq.* (June 25, 1990). The ACUS interpretation deserves special deference because the statute itself requires agencies to consult with the ACUS chairman before promulgating rules for implementation of EAJA. *See* 5 U.S.C. § 504(c)(1). In the ACUS statement, the Chairman advised agencies to adopt a broad interpretation of adjudications under Section 554, and to avoid technical disputes about whether a particular proceeding fell within the statute's coverage. *Office of the Chairman of the Administrative Conference of the United States Equal Access to Justice Act: Agency Implementation*, 46 Fed. Reg. 32,901. The Statement expressly provides that, in light of the basic purposes of EAJA, any "questions of EAJA's coverage should turn on substance - the fact that the party has endured the burden and expense of a formal hearing - rather than technicalities." *Id.*

Indeed, ACUS recognized, before the original passage of the EAJA, that the EAJA's purposes could be undermined by a narrow interpretation of its applicability to administrative adjudications. ACUS sent a letter to the House Judiciary Committee, during its consideration of EAJA, stating "[i]f a statute requires that an agency adjudication be 'determined on the record after an opportunity for an agency hearing' [as required by Section 554 (a) of the APA] ... then the section clearly applies." *Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, on S. 265, Award of Attorneys' Fees against the Federal Government*, 96th Cong., 2d Sess. ["Hearings on S. 265"] 536 (letter from Richard K. Berg, Executive

Secretary, Administrative Conference of the United States, to Hon. Peter W. Rodino, Jr., Chairman, Committee on the Judiciary, June 20, 1980) [5]

The ACUS Model Rules for Agency Implementation of EAJA addressed the scope of "under Section 554," and urged a broad interpretation based upon meeting Section 554(a)'s definition of trial-type hearings:

> The Equal Access to Justice Act provides, in 5 U.S.C. 504(b)(1)(C), that covered adversary adjudications are those "under section 554 of this title in which the position of the United States is represented by counsel or otherwise." Section 554 of the Administrative Procedure Act applies .... to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." Exactly what proceedings are to be encompassed by this language has long been a difficult legal question, and we proposed a broad interpretation of the reference to adjudications "under section 554"....

46 Fed. Reg. 32,900, 32,901 (1981).

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[5] ACUS was commenting on an earlier version of the bill that referred to "adjudications *subject to* Section 554." *See* H.R. 6336, 96th Cong., 2d Sess, § 3 (a) (1980) *reprinted in Hearings on S. 265*, 155, 156. Accordingly, EAJA was intended to reach all administrative proceedings determined on the record, after an opportunity for an agency hearing, rather than merely to reach proceedings "governed by" Section 554, even when the bill's operative language contained the more restrictive term "subject to" Section 554. *See Supra* note 2.

After legislative hearings addressing widespread concerns that EAJA's original purposes were being undermined, Congress reauthorized and amended the statute in 1985 and, in so doing, repeatedly expressed its disapproval of restrictive interpretations by both agencies and courts. See, H.R. No. 99-120 (1985), 1985 U.S. Code Cong. & Ad. News, 132, 137. *See also* H.R. Rep. No. 99-120, *supra.* at 145 [rejecting ruling in *Tulalip Tribes of Washington v. Federal Energy Regulation Commission*, 749 F.2d 1367 (9th Cir., 1984), that a statute's specific preclusion against assessment of costs against the FERC barred action for attorney's fees under Section 2412 (d)(1)(A)]; see also, H.R. Rep. No. 99-120, *supra.* at 132, 150 [criticizing misconstruction of the original EAJA, and amending statute to clarify its applicability to the Contract Disputes Act]. In addition, Congress took issue with "overly technical" judicial construction of such terms as "substantially justified," *id.* at 146 n. 26, and "prevailing party" *Id.* at 147. The Committee emphasized that the Act contemplated "an expansive view," *id.*, and a "broader meaning" for its terminology. *Id.* at 137.[6] It is implausible that a Congress which made clear that the EAJA's original purposes were remedial would embrace a definition of "adversary adjudication" that hinged upon whether a proceeding was technically "subject to" the APA, rather than whether, in substance, it was the functional equivalent of a proceeding under the APA, as are deportation proceedings.

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[6] During the floor discussions upon re-enactment, Sen. Grassley stated that the bill made certain clarifications which were "necessary because of a few court opinions that failed to focus on the incentive for careful agency action." 131 Cong. Rec. S9991-02, 99th Cong., 1st Sess. There had not then been any judicial decisions excluding applicability of EAJA from deportation proceedings; had such a misinterpretation of the statute been reported, it similarly would have been scorned as an overly technical interpretation, failing to focus upon the statute's purposes.

Congress's intention for EAJA to extend to truly adjudicative procedures that have the essential characteristics of APA proceedings, including those not technically "subject to" Section 554, is made clear by its treatment of Social Security cases. At least since *Richardson v. Perales* 402 U.S. 389 (1971), when this Court declined to decide whether the APA applies to Social Security disability claims, *Id.* at 410, there has been doubt about whether Social Security hearings are governed by Section 554 of the APA. Nevertheless, without resolving that issue, Congress expressly has confirmed the EAJA's applicability to Social Security disability claims in which the government is represented. *See* H.R. Rep. No. 120, 99th Cong. 1st Sess. 10, *reprinted in* 1985 U.S. Code Cong. & Ad. News 132, 138-139; 131 Cong. Rec. S. 9993-9994 (July 24, 1985) (statement of Sen. Heflin); *Escobar-Ruiz*, 838 F.2d at 1026-27. Evidently, Congress believed it unnecessary to resolve whether the APA applied to such claims, since applicability of EAJA was to be determined by the adversarial nature of the proceeding, rather than by the identity of the governing statute. *See id.*

Moreover, this Court's treatment in *Sullivan v. Hudson*, 490 U.S. 877, 109 S.Ct. 2248, 104 L.Ed.2d 841 (1989), rejected a blanket exclusion for all Social Security claims. Notwithstanding its determination that the Social Security proceeding was not adversarial within the meaning of § 504(b)(1)(C) of the A.P.A., this Court refused to accept the agency's call for a blanket exclusion. The EAJA statute, and its legislative history refer throughout to "the government," the "United States" or "federal agencies." Congress made no effort to exclude agencies simply because they had adversarial adjudications that were not subject to the A.P.A. The legislative history compels a conclusion that the adversarial nature of the adjudication is to be the hallmark of whether the proceeding is covered under the EAJA. S. Rep. No. 253, 96th Cong., 1st Sess. at 4, 5-6 (July 20, 1979); H. Rep. No. 1418, 96th Cong., 2d Sess. at 10, *reprinted in* 1980

U.S. Code Cong. & Ad. News, 4984, 4988; H. Rep. No. 1434, 96th Cong., 2d Sess. at 21 (Sept. 30, 1980).

2. FULFILLMENT OF CONGRESSIONAL PURPOSES MANDATES A JUDICIAL CONSTRUCTION ALLOWING THE EAJA TO REACH DEPORTATION PROCEEDINGS

The express purpose of EAJA is to reduce the economic deterrents and the disparity in resources and expertise between the United States Government, and those who would seek review of, or who would defend against, unjustified governmental action. H.R. No. 96-1418, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S. Code Cong. and Ad. News, 4984. EAJA represents Congressional recognition that, in the absence of such a provision, a party may have no realistic opportunity to respond to unjustified governmental action, and no effective remedy to secure vindication of his or her rights, causing the individual to endure an injustice rather than to contest it. *Id.* at 4988; *see also, Spencer v. N.L.R.B.*, 712 F.2d 539, 549 (D.C. Cir. 1983) (objective of EAJA is to encourage relatively impecunious private parties to challenge unreasonable or oppressive governmental action by relieving them of the fear of incurring large litigation expenses), *Commissioner, I.N.S. v. Jean*, ___ U.S. ___, 110 S.Ct. 2316, 2321 (1990) ("[T]he specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." (citation omitted)).

EAJA also was intended to deter unjustified government action. H.R. No. 96-1418, 96th Cong., 2d Sess. (1980) *reprinted in* 1980 U.S. Code Cong. and Ad. News, at 4991 ("[EAJA] helps assure that administrative decisions reflect informed deliberation. In so doing, fee-shifting becomes an instrument for curbing excessive regulation and the unreasonable exercise of Government authority.") *See also Jean*, 110 S.Ct. at 2322.

Moreover, EAJA is premised upon the concept that one who litigates against the government is "refining and formulating public policy ... provid[ing] a concrete, adversarial test of Government regulation...." H.R. Rep. No. 96-1418 at 4988. Congress wanted to avoid the establishment of legal precedent in cases where decisions would be based upon the costs of litigating, rather than upon the merits; Congress believed this would enhance the integrity of the judicial process. *Id.* at 4988-4989.

As a remedial statute, EAJA is entitled to a judicial construction enabling its objectives to be accomplished. The important public policies that led Congress to enact and re-enact EAJA dictate that successful litigants in deportation proceedings have the right to seek EAJA awards. *Escobar-Ruiz*, 838 F.2d at 1025, *citing* H.R. Rep No. 96-1418, 96th Cong., 2d Session 10 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984, 4988-4989. Judicial construction of the EAJA requires an endeavor to interpret the fee statute "in light of its purpose 'to diminish the deterrent effect of seeking review of, or defending against, [unjustified] governmental action....'" *Sullivan v. Hudson* 490 U.S. 877, 890, 109 S.Ct. 2248, 104 L.Ed.2d 841, 954 (1989).

Those subjected to deportation proceedings require the help of an attorney because deportation proceedings are "difficult for aliens to fully comprehend, let alone conduct" without the assistance of counsel. *Escobar-Ruiz*, 838 F.2d at 1025, *citing* H.R. Rep. No. 1418, 96th Cong., 2d. Sess. 10 1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984, 4988-89. Immigration proceedings have been recognized as being so complex and so lacking in consistency as to be incomprehensible to the layman and the general practitioner alike. *See Loc v. INS*, 548 F.2d 27, 28 (2d Cir. 1977). Immigration regulations are so complex that one court has said:

> Whatever guidance the regulations furnish to those cognoscenti familiar with INS procedures, this court, despite many years of legal experience, finds that they yield up meaning only grudgingly and that morsels of comprehension must be pried from mollusks of jargon.

Dong Sik Kwon v. INS, 646 F.2d 909, 919 (5th Cir. 1981).

Without the possibility of EAJA awards, individuals are likely to be discouraged from vindicating their rights against unreasonable government action, because immigration proceedings tend to be time-consuming and expensive. *Escobar-Ruiz*, 838 F.2d at 1025. Allowing important government immigration policies to remain unchallenged contradicts one of the primary purposes of EAJA: "to increase the accessibility to justice in administrative proceedings." *Id.*, citing H.R. Rep. No. 120, 99th Cong., 1st Sess., pt. 1, at 8 (1985), reprinted in 1985 U.S. Code Cong. & Ad. News 132, 136.

The risk of a fee award under EAJA was seen by Congress as "an incentive for agencies to police their own enforcement and other litigation activities more rigorously, so that only sound, well-prepared cases would be initiated or litigated. Robertson and Fowler, *Recovering Attorney's Fees from the Government Under EAJA*, 56 Tulane L. Rev. 903, 914 (1982). A primary purpose of EAJA is to refine the administration of federal law and to foster greater precision, efficiency and fairness in the interpretation of statutes and in the formulation and enforcement of governmental regulation. *See Spencer*, 712 F.2d at 541.

These general purposes of the EAJA – as well as Congress' specific intent to make the EAJA applicable to all formal adjudications in which the government is represented by counsel – would be severely undermined by the position urged here by the INS.

D. *MARCELLO V. BONDS* DOES NOT PRECLUDE THE APPLICATION OF EAJA TO DEPORTATION PROCEEDINGS.

The INS has urged a strained and legally erroneous reading of *Marcello v. Bonds*, 349 U.S. 302 (1955) for the proposition that the EAJA should not apply to deportation proceedings. *Marcello* specifically addressed the narrow issue of whether an Immigration Judge (who at that time had enforcement functions and was also under the jurisdiction of the INS District Director) could sit as an adjudicative officer. At the time that *Marcello* was decided, the only material difference that the Supreme Court could find between the A.P.A. and the I.N.A.'s deportation section was who could sit as an administrative judge, and who could sit as an immigration judge. The A.P.A., unlike the I.N.A., required that the functions of enforcement and adjudication be separate. The Court concluded, that by virtue of its specialized and unique provision for the co-identity of the immigration judge and the adjudicative officer, the I.N.A.'s hearing procedures superseded those contained in the A.P.A.[7]

The Supreme Court's reasoning in *Marcello* does not impede EAJA's application to the procedures currently followed in deportation proceedings. As *Marcello* itself noted,

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[7] In response to *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), which had held that the A.P.A. applied to deportation proceedings, Congress had passed a rider to the Supplemental Appropriations Act of 1951, 64 Stat. 1044, 1048 (1950), exempting deportation and exclusion proceedings from Section 554, 556 and 557 of the A.P.A. The Immigration and Nationality Act of 1952, however, repealed the rider, leaving the relationship between the A.P.A. and deportation proceedings uncertain. (This appears to have left the A.P.A. applicable to immigration cases unless "other provisions of the 1952 Immigration Act made the [A.P.A.] inapplicable." *Marcello*, 349 U.S. at 316 (Black, J., dissenting).

the A.P.A. had served as the model for § 242(b) of the I.N.A. and, as a result (with the one exception noted above), there was a virtual identity between the procedures governing deportation in § 242(b) of the I.N.A. and formal adjudications in §§ 554, 556 and 557 of the A.P.A. 349 U.S. at 307-08. The I.N.A. and the A.P.A. granted equivalent protections in procedural matters.[8] Today, as in *Marcello*'s time, both statutes require determinations made on the record; a proceeding at which the party has made a personal appearance; reasonable notice of charges and time and place of hearing; the privilege of representation by counsel; reasonable opportunity to present evidence and cross-examine witnesses; and decisions based upon reasonable, substantial and probative evidence.

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[8] Justices Black and Frankfurter co-authored a strongly worded dissent, asserting that upon the enactment of the Immigration and Nationality Act of 1952, the Senators and House members who had voted for the bill had been assured by the bill's sponsors that the A.P.A. was applicable to immigration cases. 349 U.S. at 302. The legislative history of the I.N.A. clearly bears this out. Senator McCarren, the sponsor of both the A.P.A. and the I.N.A. in the Senate, told Congress that the I.N.A. was not to be construed as a blanket exemption from the A.P.A. and that "this bill eliminates such an exemption in the case of deportation proceedings...." 98 Cong. Rec. 5625-26; *see also* Conf. Rep. No. 2096 (June 9, 1952), *reprinted in* 1952 U.S. Cong. & Ad. News 1754 ("the procedures provided in the bill ... remain within the framework ... of the Administrative Procedure Act"). In advocating enactment of the I.N.A., Senator McCarren told Congress: "The [A.P.A.] is made applicable to the bill [the I.N.A.]. The [A.P.A.] prevails now.... The bill [the I.N.A.] ... makes the [A.P.A.] applicable insofar as the administration of the bill is concerned.... The [A.P.A.] is the law." 98 Cong. Rec. 5778-79 (May 22, 1952). Senator McCarren further stated: "perusal of the bill will convince any fair minded man that the bill is one hundred percent within the framework of the [A.P.A.]...." 98 Cong. Rec. 5329. Representative Walters made similar comments. 98 Cong. Rec. 4416, 99 Cong. Rec. 4302.

Against the background of these parallel provisions, *Marcello* interpreted as an intentional departure from § 554(d) of the A.P.A. the one deviation in the I.N.A.: its failure to expressly require a separation-of-functions between hearing officers and prosecutors or investigators. *Marcello* did not say that the I.N.A. departed from Section 554(a) of the A.P.A. (which makes EAJA apply in deportation proceedings, as in "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing [except in six enumerated instances]"), nor did *Marcello* purport to address or rule whether all aspects of the A.P.A. were superseded.

Since the establishment of the Executive Office of Immigration Review by regulations promulgated by the Attorney General, 48 Fed. Reg. 3038-3040 (Feb. 25, 1983), deportation hearings completely conform to the procedural requirements for formal adjudication under the A.P.A. Under current regulations, 8 C.F.R. §§ 3.0 *et seq.*, immigration judges are part of a separate Executive Office of Immigration Review, are no longer supervised by the Commissioner of the INS, and have no enforcement functions. *See* 8 C.F.R. §§ 3.0, 3.10. The separate functions requirement of the A.P.A. has been adopted in immigration proceedings, and the basic distinction drawn by the Court in *Marcello* no longer is an issue.

Since deportation hearings are, in substance, indistinguishable from § 554 proceedings, they confront litigants with the same costs and burdens as in a proceeding directly governed by the A.P.A. 46 Fed. Reg. 32,900, 32,901 (1981). They are, therefore, precisely the type of adversary adjudication Congress intended to be covered by EAJA. *See Escobar-Ruiz*, 838 F.2d at 1024-25; H.R. Rep. No. 120, 99th Cong., 1st Sess., pt.1, 10, *reprinted in*, 1985 U.S. Code Cong. & Ad. News 132, 138-139.

II. SECTION 292 OF THE IMMIGRATION AND NATURALIZATION ACT ("INA") DOES NOT BAR GOVERNMENT ACCOUNTABILITY UNDER EAJA.

Section 292 of the INA provides that an individual in a deportation proceeding "shall have the privilege of being represented (at no expense to the Government) by such counsel ... as he shall choose." 8 U.S.C. § 1362. The court below held that the application of the fee shifting provisions of EAJA were overridden by the INA's requirement that legal representation be at no expense to the government. That conclusion misconstrues the relevant provisions of both EAJA and the INA.

The legislative history of EAJA clearly states that Congress simply did not wish to apply EAJA where statutes already "specifically provide" for alternative fee-shifting:

> The subsection applies to all civil actions except ... those already covered by existing ***fee-shifting statutes***.... [T]his section is not intended to replace or supersede any existing fee-statutes such as the Freedom of Information Act, the Civil Rights Act, and the Voting Rights Act in which Congress has indicated a specific intent to encourage vigorous enforcement, or to alter the standards or the case law governing those Acts. It is intended to apply only to cases ... where fee awards against the government are not already authorized.

H.R. Rep. No. 1418, 96th Cong., 2d Sess., 18 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984, 4997. (emphasis added).

The INA does not contain any such fee-shifting mechanisms. The parenthetical phrase "at no expense to the government" merely relieves the government of the

obligation to provide counsel to indigent aliens.[9] *See generally, Perez-Perez v. Hanberry*, 781 F.2d 1477 (11th Cir. 1986). The 1952 legislative history of Section 292, enacted decades before the EAJA, does not demonstrate an intent to bar fee shifting in deportation proceedings, let alone an intent anticipatorily to prohibit fee shifting under EAJA. *See* H.R. Rep. No. 1365, 82nd Cong., 2d Sess. (1952), *reprinted in* 1952 U.S. Code Cong. & Ad. News 1653, 1712; *Escobar-Ruiz* 838 F.2d at 1028.

Absent an intention to direct one litigant to pay another's attorney's fees, Section 292 is not a "fee-shifting" statute, and is not a barrier to the proper interpretation of EAJA applicability.[10] A similar issue was addressed in *Wolverton v. Heckler*, 726 F.2d 580 (1984), where the court examined the Social Security Act's limitation of the amount a successful claimant must pay toward attorney's fees (42 U.S.C. § 406(b)). *Wolverton* concluded that the provisions were not "fee-shifting," and that applicability of EAJA to Social Security claims would not impermissibly supersede an existing fee-shifting statute. *Wolverton*, 726 F.2d at 582.

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[9] The Fifth Amendment, however, may require that counsel be appointed at government expense. See *Aguilera-Enriquez v. I.N.S.* 516 F.2d 565, 569 (6th Cir. 1975, *cert. denied*, 423 U.S. 1050 (1976); *Martin-Mendoza v. I.N.S.* 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied*, 419 U.S. 113 (1975); Note, *Right to Counsel in a Deportation Hearing*, 63 Wash.L.Rev. 1019, 1027 (1988).

[10] The INA committee report discusses § 292 when it describes the rights aliens have in deportation hearings. H.R. Rep. No. 1365, 82nd Cong., 2nd Sess. 5, *reprinted in* 1952 U.S.Code Cong. & Ad. News 1653, 1712. It is unlikely that Congress meant to prohibit fee shifting in its reference to Section 292 within the very context of delineating aliens' rights. Thomas W. Holm, *Aliens' Alienation From Justice: The Equal Access to Justice Act Should Apply To Deportation Proceedings*, 75 Minn.L.Rev. 522-523 n. 140 (1991).

EAJA and Section 292 enjoy two entirely separate domains. Section 292 addresses the relationship between indigency and the right to counsel; EAJA is a fee-shifting statute (whether counsel is paid or not) to reimburse the expense of repelling unjustified and unreasonable government action. *Escobar-Ruiz*, 838 F.2d at 1026; *citing*, H.R. Rep No. 120, 99th Cong., *reprinted in* 1985 U.S. Code Cong & Ad. News 132, 132-133. In the case at bar, Petitioner did not request the appointment of counsel at government expense. Petitioner procured counsel through her own efforts and prevailed. Instead, Petitioner seeks to recover her attorney's fees under the EAJA fee-shifting statute since the government acted unreasonably. An award to her would fulfill EAJA's purposes without impinging upon, let alone undermining, the purposes of Section 292.

Thus, Section 292 and EAJA are not incompatible. This Court has held that "when there are two statutes that are capable of coexistence, it is the court's duty, absent a clearly expressed congressional intent to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535 (1974). To determine whether two statutes are capable of co-existence, courts must look to the Congressional purposes behind the enactments. *Id.* at 551. Courts must interpret the statutes to give effect to both if congressional purposes still can be met. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976).

Because of their differing purposes, Section 292 (relationship between indigency and the right to counsel) and EAJA (fee-shifting to reimburse expenses of repelling unjustified and unreasonable government action) can and should co-exist, and both can be given full effect.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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Dated: May 1, 1991

(6)

No. 90-1141

In the Supreme Court of the United States

OCTOBER TERM, 1990

RAFEH-RAFIE ARDESTANI, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the Equal Access to Justice Act authorizes the award of attorney's fees and expenses for an administrative deportation proceeding before the Immigration and Naturalization Service.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A40) is reported at 904 F.2d 1505. The opinions of the Board of Immigration Appeals (Pet. App. A43-A47) and of the Immigration Judge (Pet. App. A48-A54) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1990. A petition for rehearing was denied on September 5, 1990. Pet. App. A41. The petition for a writ of certiorari was filed on December 3, 1990, and granted on March 4, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Petitioner, an Iranian citizen, entered the United States as a visitor in December 1982. Pet. App. A4. She lawfully remained in this country until the end of May 1984, when she sought political asylum. INS denied her application and issued an order to show cause why she should not be deported. Petitioner thereafter conceded her deportability, but renewed her asylum application. The immigration judge granted her request for asylum, and INS did not seek further administrative review. Pet. App. A4-A7.

In the wake of these proceedings, petitioner's counsel filed an application for attorney's fees and expenses covering the costs incurred in the administrative deportation proceedings, asserting entitlement under the Equal Access to Justice Act (EAJA), 5 U.S.C. 504(a)(1). Following the Ninth Circuit's decision in *Escobar Ruiz* v. *INS*, 838 F.2d 1020 (1988), the immigration judge concluded that administrative proceedings under the Immigration and Nationality Act are covered by EAJA, and awarded fees in the amount of $1,071.85. Pet. App. A50, A54.

On INS's appeal, the Board of Immigration Appeals (BIA) vacated the award. Pet. App. A43-A47. It relied on 28 C.F.R. 24.103, which provides that immigration proceedings are not within EAJA's coverage. Pet. App. A46.[1] Noting that "[t]he Board and immigration judges (except as provided by statute) only have such authority as is created and delegated by the Attorney General" (*id.* at A44), the BIA concluded that "absent a regulatory change or controlling court order, an immigration judge has no

[1] The BIA also noted its disagreement with the immigration judge's conclusion that deportation proceedings are within EAJA's scope. Pet. App. A44.

authority under law or regulation to consider an application for attorney fees under EAJA." *Id.* at A46.[2]

The Eleventh Circuit affirmed the BIA's decision, with one judge dissenting. Pet. App. A1-A40. The court of appeals held that EAJA's plain language demonstrates that it does not apply to deportation proceedings. The court explained that EAJA permits the award of fees to a prevailing party in an adversary adjudication before an agency (5 U.S.C. 504(a)(1)). The term "adversary adjudication" is defined (5 U.S.C. 504(b)(1)(C)) as "an adjudication under [5 U.S.C.] section 554." Agreeing with three other circuits, the court held that the term "under section 554" means "governed by" or "subject to" Section 554. Pet. App. A18-A19.[3] Because the procedures prescribed in Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252—not those of 5 U.S.C. 554—govern deportation proceedings, a deportation proceeding is not, the court concluded, an "adversary adjudication" under EAJA. Pet. App. A18-A22.

[2] The Board recognized that in *Escobar Ruiz*, the Ninth Circuit had held en banc that EAJA does apply to administrative deportation hearings, but explained that "authority from one circuit is not binding in another." Pet. App. A46-A47.

[3] The court cited *St. Louis Fuel & Supply Co.* v. *FERC*, 890 F.2d 446, 449-451 (D.C. Cir. 1989); *Owens* v. *Brock*, 860 F.2d 1363, 1366 (6th Cir. 1988); and *Clarke* v. *INS*, 904 F.2d 172 (3d Cir. 1990). Since the decision below, two other circuits have reached the same conclusion. *Hodge* v. *United States Dep't of Justice*, 929 F.2d 153 (5th Cir. 1991); *Escobar* v. *INS*, No. 90-2901 (4th Cir. June 4, 1991). See also *Full Gospel Portland Church* v. *Thornburgh*, 927 F.2d 628 (D.C. Cir. 1991).

The court found further support in the fact that in regulations implementing EAJA (28 C.F.R. 24.103 (1982)), the Attorney General did not include deportation proceedings among the "adversary adjudications" conducted within the Department of Justice. Pet. App. A22-A26. The court concluded that Congress was presumptively aware of this regulation when it reenacted EAJA in 1985 without altering the relevant statutory language. *Id.* at A23-A25.[4]

Finally, the court relied (Pet. App. A26-A32) on Section 292 of the Immigration and Nationality Act, 8 U.S.C. 1362, which states that "[i]n any exclusion or deportation proceedings, * * * the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." The court observed that "the explicit bar on attorney fees against the government found in [8 U.S.C. 1362] is to be regarded as a narrow exception to the general provisions of EAJA and that partial repeal of section 1362 by implication is unwarranted to achieve the broad purposes of EAJA." Pet. App. A32.[5]

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[4] The court also held that the Attorney General's construction of EAJA—adopted after consultation with the Administrative Conference of the United States, as required under 5 U.S.C. 504(c)(1)—is a permissible construction of the statute, and thus entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

[5] The court also concluded that the existence of 8 U.S.C. 1362 is a "special circumstance mak[ing] an award unjust" under EAJA (5 U.S.C. 504(a)(1)). The court observed that "[i]t would be unjust to allow such an award against the government since Congress specifically has determined that fees against the government are not available in this context." Pet. App. A29.

Senior District Judge Pittman (sitting by designation) dissented (Pet. App. A34-A40), adopting the Ninth Circuit's reasoning in *Escobar Ruiz*.

SUMMARY OF ARGUMENT

EAJA defines—in Section 504(b)(1)(C)(i)—the administrative proceedings for which attorney's fees may be available as "adjudication[s] under section 554 of [title 5] * * *." In *Marcello* v. *Bonds*, 349 U.S. 302 (1955), this Court held that deportation proceedings are not conducted under the Administrative Procedure Act (5 U.S.C. 554), but rather under the comprehensive scheme of the Immigration and Nationality Act. Thus, the plain language of 5 U.S.C. 504(b)(1)(C)(i) compels the conclusion that EAJA is inapplicable to deportation proceedings. The long-established principle that waivers of sovereign immunity must be unequivocally expressed reinforces the evident statutory meaning, and requires rejection of petitioner's argument that "under section 554" should be generously interpreted to mean "similar to those governed by section 554."

EAJA's statutory design and legislative history confirm the plain language of its text. Throughout Section 504, "under" unequivocally means "subject to"; moreover, petitioner's interpretation would render the other subsections of Section 504(b)(1)(C) redundant. What is more, the legislative history shows that, in the various bills that were considered in the course of Congress's enactment of EAJA in 1980, the Article I Branch used the terms "under" and "subject to" interchangeably. After consultation with the Administrative Conference of the United States, as required by 5 U.S.C. 504(c), the Attorney General promulgated regulations in 1982, stating that

administrative deportation proceedings are not covered by EAJA. When Congress reenacted EAJA in 1985 without changing the definition of "adversary adjudication," it indicated no disagreement with that interpretation.

Petitioner asserts that her proposed definition best serves the statutory purpose of encouraging persons aggrieved by unreasonable agency actions to vindicate their rights. That broad contention, which would equally support awards of attorney's fees in all types of agency proceedings, overlooks the fact that EAJA, like most legislation, represents a legislative resolution of a number of competing objectives, including concern for its costs to the public fisc. Respect for Congress's determination requires compliance with the statutorily imposed limitations on the remedy provided.

Even if the meaning of 5 U.S.C. 504(b)(1)(C)(i) were unclear, Section 292 of the Immigration and Nationality Act, 8 U.S.C. 1362, independently precludes the award of attorney's fees in any administrative exclusion or deportation proceeding. It specifically provides that the person concerned may be represented, but "at no expense to the Government." This explicit ban on the award of attorney's fees was not repealed by implication by the more general provisions of EAJA.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE STATUTE, READ IN CONJUNCTION WITH THE PRINCIPLE THAT WAIVERS OF SOVEREIGN IMMUNITY MUST BE STRICTLY CONSTRUED, DEMONSTRATES THAT EAJA DOES NOT APPLY TO DEPORTATION PROCEEDINGS

It is well settled that "in all cases involving statutory construction, [the] 'starting point must be the language employed by Congress,' and [the reviewing court must] assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982) (citations omitted); accord *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 310 (1989). Moreover, the plain language of the statute is conclusive unless there is a clearly expressed legislative intention to the contrary. *American Tobacco Co.* v. *Patterson*, 456 U.S. at 68; *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 110 S. Ct. 1570, 1575 (1990).

It is equally well established that a statute that waives sovereign immunity "must be 'construed strictly in favor of the sovereign' * * * and not 'enlarge[d] . . . beyond what the language requires.'" *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983) (citations omitted) (construing Clean Water Act attorney's fee provision, 42 U.S.C. 7607(f)). Accord *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986) (construing Title VII attorney's fee provision, 42 U.S.C. 2000e-5(k), Civil Rights Act of 1964). It follows that waivers of sovereign immunity cannot be implied, but must be unequivocally expressed. *Shaw*, 478 U.S. at 318; *United States* v. *King*, 395 U.S. 1, 4 (1969). Cf. *Pine Hill Coal Co.* v. *United*

States, 259 U.S. 191, 196 (1922) ("where, as here, [the government's] liability would mount to great sums, only the plainest language could warrant a court in taking it to be imposed").

EAJA renders the United States liable for attorney's fees that it would not otherwise owe. See *Escobar* v. *INS*, No. 90-2904 (4th Cir. June 4, 1991), slip op. 8 n.4; *Spencer* v. *NLRB*, 712 F.2d 539, 543-545 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984). It is therefore a statute that waives sovereign immunity, and must be strictly construed in favor of the sovereign. *E.g.*, *In re Perry*, 882 F.2d 534, 538 (1st Cir. 1989); *St. Louis Fuel & Supply Co.* v. *FERC*, 890 F.2d 446, 449-451 (D.C. Cir. 1989).[6]

[6] Petitioner and amicus American Bar Association (ABA) ignore sovereign immunity principles. Amicus American Immigration Lawyers Association (AILA) discusses sovereign immunity, AILA Br. 9-11, but relies upon inapposite cases. For example, in *Irwin* v. *Veterans Admin.*, 111 S. Ct. 453 (1990), the Court held that equitable tolling principles apply in Title VII actions against the government, because "making the rule of equitable tolling applicable to suits against the government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the Congressional waiver." *Id.* at 457. The instant case, however, does not involve a *de minimis* broadening of the government's waiver (in cases involving the subject matter of that waiver) to make the waiver consistent with a private sector analogue. Instead, the claim here seeks expansion of a statutory term to encompass additional subject matter that would expose the government to potential fee liability in a wide variety of categories of cases wholly outside the statutory text. Moreover, the government does not argue that a "ritualistic formula" is required to waive sovereign immunity. Cf. *Franchise Tax Bd.* v. *United States Postal Sys.*, 467 U.S. 512, 521 (1984). Instead, we simply contend that the congressional intent must be plain before a statute waiving sovereign immunity may be interpreted in the expansive manner advocated by petitioner and amici.

EAJA provides that "[a]n agency that conducts an adversary adjudication shall award [attorney's fees and expenses] to a prevailing party other than the United States," unless the agency position was substantially justified. 5 U.S.C. 504(a)(1). The term "adversary adjudication" is explicitly defined as "an adjudication *under* section 554 of [title 5]" (5 U.S.C. 504(b)(1)(C)(i); emphasis added). It is well established that deportation proceedings are *not* conducted under 5 U.S.C. 554, but rather under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* *Marcello* v. *Bonds*, 349 U.S. 302, 308-310 (1955); *Ho Chong Tsao* v. *INS*, 538 F.2d 667, 669 (5th Cir. 1976), cert. denied, 430 U.S. 906 (1977); *Cisternas-Estay* v. *INS*, 531 F.2d 155, 158-159 (3d Cir.), cert. denied, 429 U.S. 853 (1976); *Pollgreen* v. *Morris*, 911 F.2d 527, 534 (11th Cir. 1990); *Escobar* v. *INS*, slip op. 7.[7] Consequently, EAJA is—by its terms—inapplicable to deportation proceedings, and hence no attorney's fees for work conducted in such proceedings can be awarded under it.

[7] In *Marcello*, this Court rejected the contention that a key APA provision requiring separation of prosecutorial and adjudicative functions applies in deportation proceedings. Similarly, in *Giambanco* v. *INS*, 531 F.2d 141, 145 (1976), the Third Circuit relied upon *Marcello* to hold that "the APA has no relevance" to BIA review of an immigration judge's refusal to revoke the plaintiff's deportation order. The Third Circuit again followed this reasoning in *Cisternas-Estay* v. *INS*, *supra*, and the Fifth Circuit followed *Giambanco* in *Ho Chong Tsao* v. *INS*, *supra*. All of these decisions recognized the inapplicability of 5 U.S.C. 554 in light of the comprehensive procedural scheme of the Immigration and Nationality Act.

In *Marcello*, the Court "consider[ed] all of the differences in the hearing provisions of the [Immigration and Naitonality Act and the APA] in determining whether the Administrative Procedure Act is to govern," 349 U.S. at 306. The Court concluded:

> [W]e cannot ignore the background of the 1952 immigration legislation, its laborious adaptation of the Administrative Procedure Act to the deportation process, the specific points at which deviations from the Administrative Procedure Act were made, the recognition in the legislative history of this adaptive technique and of the particular deviations, *and the direction in the statute that the methods therein prescribed shall be the sole and exclusive procedure for deportation proceedings.*

Id. at 310 (emphasis added).

This Court's holding in *Marcello* that the Immigration and Nationality Act "effectuate[s] an exemption from the Administrative Procedure Act [and] expressly supersedes [its] hearing provisions" (349 U.S. at 310) has never been legislatively or judicially overruled; *Marcello*, in short, remains the law.[8] Congress is presumed to have been aware of *Marcello* when, upon EAJA's enactment in 1980, it defined

[8] Contrary to the assertions of petitioner and amici, changes in the INS regulations regarding the status of immigration judges and the BIA in no way undermine the continuing validity of *Marcello*'s holding that the APA does not apply in the context of deportation proceedings. The new regulations have been voluntarily adopted by the agency; they were not "mandated" by the APA (or, for that matter, by the Immigration and Nationality Act), nor has the agency purported to act in accordance with the strictures of the APA. See, *e.g.*, *United States* v. *Florida East Coast Ry.*, 410 U.S. 224, 234-238 (1973).

"adversary adjudication" as "an adjudication under section 554" of the APA. Cf., *e.g.*, *Cannon* v. *University of Chicago*, 441 U.S. 677, 698-699 (1979); *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978). *Marcello* therefore is dispositive here.[9]

As petitioner acknowledges (Pet. Br. 15, citing 18 *The Oxford English Dictionary* 947-951 (2d ed. 1989)), the word "under" has a number of dictionary meanings, including "subject to" or "governed by."[10] In the context of the phrase "under section 554," this meaning unquestionably is the one that "first springs to mind," *Kosak* v. *United States*, 465 U.S. 848, 854 (1984).[11] In construing the pertinent

[9] There is no merit to petitioner's assertion (Pet. Br. 14) that, notwithstanding *Marcello*, Section 554 applies to immigration proceedings because the APA does not itself explicitly exempt them. A proceeding is no more "under section 554" when it has been definitively determined by judicial construction to be exempt therefrom, than when it is exempt by virtue of express statutory language. Petitioner's reliance (Pet. Br. 15-16 n.3) on *Mississippi River Fuel Corp.* v. *Slayton*, 359 F.2d 106 (8th Cir. 1966), rev'd on other grounds *sub nom. Levin* v. *Mississippi River Fuel Corp.*, 386 U.S. 162 (1967), is unfounded. That case held that the phrase "under applicable [s]tate law" encompassed *both* statutory law and judicial construction. *Id.* at 168. Thus, to the extent that *Mississippi River Fuel Corp.* is apposite here, it is contrary to petitioner's position.

[10] Cf. *Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800, 808-809 (1988) (as in other "arising under" jurisdictional statutes, federal courts' jurisdiction over cases "arising under" federal patent law covers "cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law").

[11] The fact that this is the usual meaning of the word in the legal context is demonstrated by petitioner's filings in

part of the definition of "adversary adjudication" (5 U.S.C. 504(b)(1)(C)(i)), it is irrelevant that there may be other possible meanings of "under," because it must be assumed that the legislative purpose is expressed by the "ordinary meaning of the words used." *American Tobacco Co.* v. *Patterson*, 456 U.S. at 68, particularly when that meaning properly results in a narrow construction of the statute in favor of the sovereign. *Shaw*, 478 U.S. at 318; *In re Perry*, 882 F.2d at 538 ("words" of EAJA must be narrowly construed); *St. Louis Fuel & Supply Co.*, 890 F.2d at 449-451. Thus, the principles of plain meaning jurisprudence and strict construction of waivers of sovereign immunity converge in this case to preclude an expansive definition of the term "under section 554." *Escobar* v. *INS*, slip op. 6-7.

Of course, Congress could easily have adopted the definition of "adversary adjudication" for which petitioner and amici contend, by the simple expedient of adding a phrase such as "or similar provision of law" after the term "under section 554 of this title." It did not do so. There is therefore no textual basis for petitioner's revisionist suggestion (Pet. Br. 20) that "under section 554" should be construed to mean "the functional equivalent of a proceeding under [*sic*]" Section 554. Cf., *e.g.*, *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 522-523 (1984). This is classic rewriting of legislation in the lawyer's office, rather than in Congress itself. The language that Congress *did* adopt establishes that EAJA does not apply to de-

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this very case, which repeatedly use the word in that way. See, *e.g.*, Pet. 3 (this Court's jurisdiction "invoked under 28 U.S.C. § 1254(1)"), 2, 10 (claim for fees "under the Equal Access to Justice Act"); Pet. Br. 4, 6 (same).

portation proceedings. And it is, of course, the statutory text that is law.

II. THE STRUCTURE, HISTORY AND PURPOSES OF EAJA SUPPORT THE CONCLUSION THAT EAJA DOES NOT APPLY TO DEPORTATION PROCEEDINGS

The Court has recognized that it can be possible to rebut the "strong presumption" that the ordinary and natural meaning of the language of the statute expresses the intent of Congress. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 431, 432 n.12 (1987). However, as one might expect, this is not to be done "lightly." *Id.* at 431. "When * * * the terms of a statute [are] unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances" (*Rubin* v. *United States*, 449 U.S. 424, 430 (1981) (internal quotation marks omitted))—*i.e.*, where there is a " 'clearly expressed legislative intention' contrary to" that plain language (*Cardoza-Fonseca*, 480 U.S. at 432 n.12, citing *United States* v. *James*, 478 U.S. 597, 606 (1986)). Accord *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). That is a general way of stating a more specific inquiry—whether this is "one of the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' " *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 310 (1989), quoting *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989), in turn quoting *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

This is not that rare case. Not only is any "clearly expressed legislative intention" to the contrary lacking here; the statutory structure, legislative history,

and purposes of the statute all buttress its plain meaning.

A. The Statute's Structure Is Inconsistent With Petitioner's Attempt To Expand The Pertinent Statutory Text

EAJA's structure refutes petitioner's broad—and unnatural—interpretation of the term "under." As the D.C. Circuit aptly stated, "[t]he word 'under' appears several times in EAJA. In other locations, no creative reading is possible—'under' means 'subject [or pursuant] to' or 'by reason of the authority of.'" *St. Louis Fuel & Supply Co.*, 890 F.2d at 450; accord *Escobar* v. *INS*, slip op. 6 & n.3.[12] Where Congress uses the same term in different sections of a statute, that term should be given a consistent interpretation, absent clear evidence of contrary legislative intent. *Sorensen* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986); *Sullivan* v. *Stroop*, 110 S. Ct. 2499, 2504 (1990); cf. *United Savings Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). *A fortiori*, where—as here—the term is used repeatedly in the *same section* of the statute, it should be given the same meaning throughout the section. There is no evidence that Congress intended to promote *inconsistent* interpretations of the term "under" in Section 504.

The structure of Section 504(b)(1)(C) itself supports our reading of "under section 554." That provision contains three separate definitions of "adversary adjudication": (i) the one at issue here, referring to adjudications under the APA; (ii) administrative appeals pursuant to the Contract Disputes Act of 1978 (41 U.S.C. 607); and (iii) "any hearing conducted under chapter 38 of title 31 [Administrative Remedies for False Claims and Statements, 31 U.S.C. 3801 *et seq.*]." The administrative hearings referred to in subsections (ii) and (iii) utilize procedures similar to those required by the APA, although they are not governed by that statute.[13] See

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[12] The D.C. Circuit in *St. Louis Fuel & Supply Co.* referred specifically to the following uses of the term: Section 504(a)(2) requires a party seeking fees to file an application with the agency showing that he "is eligible to receive an award under this section"; Section 504(c)(2) provides for an appeal by a party dissatisfied with "a determination of fees and other expenses made under subsection (a)"; and Section 504(d) provides for agency payment of "[f]ees and other expenses awarded under this subsection."

The term also occurs in a number of other places throughout Section 504, always with the meaning of "governed by." See Section 504(f) ("No award may be made under this section for costs, fees, or other expenses which may be awarded under section 7430 of the Internal Revenue Code of 1986."); Section 504(a)(2) (no decision on application for fees "shall be made under this section" while appeal of agency action is pending); Section 504(a)(3) ("The decision of the adjudicative officer of the agency under this section" shall be part of the record, and the agency decision on the application "shall be the final administrative decision under this section."); Section 504(b)(1)(B)(ii) (certain organizations "exempt from taxation under section 501(a) of [the Internal Revenue] Code" may be eligible parties regardless of net worth); Section 504(b)(1)(C)(iii) (including as "adversary adjudication" "any hearing conducted under chapter 38 of title 31 [governing administrative remedies for false claims and statements]"); Section 504(c)(2) ("The court's determination on any appeal heard under this paragraph" must be based only on the agency record.).

[13] The Program Fraud Civil Remedies Act of 1986 provides for administrative hearings that comply with the APA where the authority is subject to the APA "to the extent that such provisions are not inconsistent with the provisions of this

Fidelity Constr. Co. v. *United States*, 700 F.2d 1379, 1386-1387 (Fed. Cir.) (Contract Disputes Act of 1978), cert. denied, 464 U.S. 826 (1983). If petitioner's interpretation were correct, then the proceedings referred to in the second and third subsections would be covered by the first subsection, and thus there would be no need to identify them specifically.[14] Petitioner's interpretation thus would transform subsections (ii) and (iii) into mere surplusage, a "construction [that] violates the established principle that a court should 'give effect, if possible, to every clause and word of a statute.'" *Moskal* v. *United States*, 111 S. Ct. 461, 466 (1990); *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 103 (1989); *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510, n.22 (1986).

chapter." 31 U.S.C. 3803(g)(1)(A)(i). Where the authority is not subject to the APA, the head of the authority must promulgate procedures governing such hearings. 31 U.S.C. 3803(g)(1)(B). In either case, the person alleged to be liable is entitled to notice and a hearing (31 U.S.C. 3803(d)), a determination of liability on the record (31 U.S.C. 3803(f)), and a written decision, including findings and determinations (31 U.S.C. 3803(g)(4)).

The Contract Disputes Act of 1978 directs the Administrator for Federal Procurement Policy to issue guidelines for the procedures to be followed by agency boards of contract appeals. 41 U.S.C. 607(h). The Uniform Rules Of Procedure for Boards of Contract Appeals contemplate procedures modeled on those of a judicial proceeding, specifically including the preparation of a "record upon which the Board's decision will be rendered." Uniform R. 13, P. Latham, *Government Contract Disputes*, APP-10 (2d ed. 1983).

[14] While subsection (ii) was added specifically to overturn the result in *Fidelity Constr. Co.* v. *United States*, *supra* (see H.R. Rep. No. 120, 99th Cong., 1st Sess. Pt. 1, at 15 (1985)), there is no similar explanation for the inclusion of subsection (iii). And if Congress had intended to adopt petitioner's interpretation of subsection (i), it would have been more logical for it to overturn *Fidelity Constr. Co.* by clarifying the language of subsection (i) to include proceedings similar to those under Section 554 than by adding a new subsection (ii), applying only to the Contract Disputes Act of 1978. Cf. *Escobar* v. *INS*, slip op. 8-9 (additions of subsections (ii) and (iii) "reflect Congress' awareness that the scope of the EAJA fee award provision is limited to 'adversary adjudications,' *i.e.*, those 'under' or governed by the APA").

B. The History Of The Pertinent Statutory Language Corroborates And Reinforces Its Plain Meaning

The history of the term "under section 554"—as found in the original 1980 enactment of EAJA, in its 1985 reenactment, and in the period between those dates—further suggests that the phrase "under section 554" means "subject to" or "governed by" that Section. Certainly nothing in that history provides the "clearly expressed" legislative intent that this Court has indicated is required in order to do that which is rare indeed—to override the plain meaning of the statutory language by resort to materials that were not themselves enacted into law. See *Cardoza-Fonseca*, 480 U.S. at 432 n.12.

1. *The Legislative History Of The 1980 Act Corroborates That Congress Equated The Terms "Under" And "Subject To"*

The 1980 version of EAJA originated in S. 265 in the 96th Congress.[15] The bill passed by the Senate

[15] The legislative history of the 1980 Act is somewhat convoluted. S. 265 passed the Senate in July 1979. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 6-7 (1980). S. 265, H.R. 1649, and several related bills were then considered by the House Committee on the Judiciary, which reported S. 265 in amended form. *Id.* at 8. On September 26, 1980, the Senate

in July 1979 defined the administrative adjudications for which attorney's fees could be recovered as those "subject to" the APA. S. 265, 96th Cong., 2d Sess. (1980) (Senate version). The House Judiciary Committee hearings focused on H.R. 6429 and H.R. 7208 (both of which used the "subject to section 554" terminology), as well as on S. 265. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 7 (1980). The bill reported out by that Committee recommended passage of S. 265, with amendments. One of the Committee's amendments narrowed the administrative adjudication provision to limit coverage to adversary administrative adjudications—ones in which the government's position is represented. In the course of making that change, the House version of S. 265 adopted the current terminology, defining an adversary adjudication as one "under section 554 of this title." That terminology was preserved in the amendment to H.R. 5612 passed by the Senate, adopted by the Conference Committee, and enacted.

The Reports accompanying these bills convincingly demonstrate that Congress attached no significance to the change in terminology, but instead intended "under" to mean the same as "subject to." Thus, the Senate Report on the original S. 265, which used the term "subject to," explained that this language "covers only adjudications *under* 554 of title 5 and not rulemaking or other administrative proceedings."

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attached S. 265, as amended by the House, to the Senate's amendments to H.R. 5612, a bill to amend the Small Business Act, and requested a conference. 126 Cong. Rec. 27,677-27,683 (1980). The Conference Report recommended adoption of the Senate version of H.R. 5612. H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 1 (1980). That was the bill enacted, with an amendment not here relevant. 126 Cong. Rec. 28,637-28,649, 28,841-28,846 (1980).

S. Rep. No. 253, 96th Cong., 1st Sess. 15 (1979) (emphasis added).[16] Moreover, H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11-12 (1980), explained that the bill it reported to the House was "essentially the same" as the Senate version of S. 265, specifically identifying a number of changes, including one designed "[t]o limit [covered] administrative proceedings to 'adversary adjudications' in which the position of the U.S. is represented." Although the House Report thus focused precisely on the definition change, it did *not* suggest that there was any significance in the change from "subject to" to "under."[17]

Ignoring this evidence, petitioners and amici focus on two words in a single statement in the Conference Report: "[t]he conference substitute defines adversary adjudication as an agency adjudication *defined under* the Administrative Procedure[] Act." H.R.

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[16] The Report further explained that "[t]he definition of 'adjudication' for the purposes of this section excludes ratemaking and licensing application hearings which are considered adjudication *under section 554* of title 5 for other purposes. However, the exclusion does not extend to proceedings *under section 554* involving the * * * modification * * * of a license." (S. Rep. No. 253, *supra*, at 17 (emphasis added)).

[17] It would, in any event, have been anomalous for the Committee to have intended—in the course of making a change designed to *limit* the coverage of EAJA—to create, without explanation, a potentially broad and undefined *expansion* of its coverage to any proceeding that was in some way similar to a proceeding subject to Section 554. Instead, as the D.C. Circuit observed in *St. Louis Fuel & Supply Co.*, 890 F.2d at 451, "[i]t seems most plausible, given the legislative silence regarding the word change, that the drafters [of the House amendments to S. 265] made the substitution either inadvertently or because one word ('under') sounded better than two ('subject to') in the new location."

Conf. Rep. No. 1434, 96th Cong., 2d Sess. 23 (1980) (emphasis added). That statement, ambiguous in itself,[18] does not, in context, support petitioner's interpretation. The Conference Committee emphasized that the definitions of adversary adjudication in the Senate bill and the House-passed version of S. 265 are identical, and that "the conference substitute adopts the Senate provision." *Ibid.* The language on which petitioner relies can scarcely be read to suggest that the Conference Committee nevertheless intended to change the interpretation of that language given in the earlier House and Senate Reports —let alone that that intention was stated with the requisite clarity to override the statutory text and the House and Senate Reports to boot. Accordingly, as several courts of appeals have recognized, "[t]here is no evidence in the legislative history to indicate that the conference committee understood the term 'defined under' to include within EAJA coverage those proceedings that are not governed by section 554 but instead are merely conducted in a similar manner." *Owens* v. *Brock*, 860 F.2d 1363, 1366 (6th Cir. 1988); accord Pet. App. A15-A19; *Clarke* v. *INS*, 904 F.2d 172, 175-176 (3d Cir. 1990); *Hodge* v. *United States Dep't of Justice*, 929 F.2d 153, 156-157 (1991); *St. Louis Fuel & Supply Co.*, 890 F.2d at 450; *Escobar*, slip op. 7, 9-10.

[18] While a proceeding that is not subject to the APA can certainly be similar to, or even identical to, one defined under the APA, it would not ordinarily be characterized as itself "defined under" the APA. Cf. *Owens* v. *Brock*, 860 F.2d at 1366 (suggesting that Conference Report statement supports "precisely the opposite interpretation" to that of petitioner).

2. *Prior To EAJA's 1985 Reenactment The Attorney General's Regulations Authoritatively Interpreted EAJA As Inapplicable To Deportation Proceedings*

Soon after EAJA's enactment in 1980, the Administrative Conference of the United States (ACUS) issued model rules for agency implementation of EAJA. 46 Fed. Reg. 32,900 (1981). ACUS had originally proposed that EAJA fees should be awarded in administrative adjudications not subject to the APA.[19] In issuing the model rules, ACUS responded to comments that this "tentative interpretation of the phrase 'under section 554' was impermissibly broad, since waivers of sovereign immunity are to be construed narrowly, and that the draft model rules' liberal construction would distort the plain meaning of the phrase." 46 Fed. Reg. 32,901 (1981). ACUS further recognized that "if Congress did intend to restrict awards to cases required to be conducted under the procedures of section 554, then agencies have no legal authority to award fees under the Act in any other class of cases." *Ibid.* Accordingly, ACUS left it up to individual agencies to determine in the first instance whether specific agency proceedings are "under section 554" (*ibid.*; see also *id.* at 32,902).

In promulgating the Department of Justice regulation, the Attorney General determined—on the basis

[19] The letter to the House Judiciary Committee from the ACUS Executive Secretary, on which petitioner relies (Pet. Br. 18-19), is an example of this earlier interpretation. See *Award of Attorneys' Fees Against the Federal Government: Hearings on S. 265 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 536 (1980).

of *Marcello*—that deportation proceedings do not fall within EAJA's reach. 28 C.F.R. 24.103; 46 Fed. Reg. 48,921, 48,922 (1981) (interim rule with request for public comment); 47 Fed. Reg. 15,776 (1982). Although the regulations were submitted to ACUS pursuant to 5 U.S.C. 504(c)(1), ACUS did not question the Attorney General's view regarding the non-applicability of EAJA to deportation proceedings.[20] See 47 Fed. Reg. 15,774, 15,775-15,776 (1982). Furthermore, Congress indicated no disagreement with the Attorney General's view, either when it reenacted and amended 5 U.S.C. 504 in 1985 or at any time thereafter. See *Cannon* v. *University of Chicago*, 441 U.S. at 698-699; *Lorillard* v. *Pons*, 434 U.S. at 580-581 (Congress presumptively aware of relevant administrative interpretations). The failure of either ACUS or Congress to take issue with the Attorney General's interpretation of the EAJA definition corroborates that the Attorney General correctly interpreted the legislative intent. Moreover, as the court of appeals here recognized (Pet. App. A25-A26), the Attorney General's interpretation in the regulations of the nature of deportation proceedings—an interpretation that suggests the non-applicability of EAJA thereto—is entitled to judicial deference.

[20] In relevant part, 5 U.S.C. 504(c)(1) provides that "[a]fter consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses."

3. *The 1985 Reenactment Of EAJA Made No Change In The Pertinent Statutory Language And Congress Expressed No Intent To Repudiate The Established Interpretation Of That Language*

In 1985, Congress reenacted EAJA and made several specific changes, none of which is relevant here.[21] The definition of "adversary adjudication" remained precisely as it was in the 1980 Act. Petitioners and amici suggest that certain language in the 1985 House Committee Report (H.R. Rep. No. 120, 99th Cong., 1st Sess. (1985)) supports their interpretation of this definition. As this Court explained in refusing to be swayed by other far more directly relevant language in the same Report (*Pierce* v. *Underwood*, 487 U.S. 552, 566-567 (1988)):

> If this language is to be controlling upon us, it must be either (1) an authoritative interpretation

[21] For example, Congress expanded the definition of "adversary adjudication" to include any appeal of a decision made pursuant to Section 6 of the Contract Disputes Act of 1978. 41 U.S.C. 605. See 5 U.S.C. 504(b)(1)(C)(ii). This change overruled the decision in *Fidelity Constr. Co.* v. *United States*, 700 F.2d 1379 (Fed. Cir.), cert. denied, 464 U.S. 826 (1983), which held that EAJA did not apply to such administrative appeals. H.R. Rep. No. 120, 99th Cong., 1st Sess. Pt. 1, at 15 (1985). Congress also overruled the holding in *Tulalip Tribes* v. *FERC*, 749 F.2d 1367 (9th Cir. 1984), that, in light of a statute denying costs for certain FERC proceedings, an award of fees under EAJA for such proceedings was also precluded. See H.R. Rep. No. 120, *supra*, at 17. In addition, Congress amended the definition of the term "final judgment" for purposes of determining the timeliness of a fee application or "prevailing party" status, and made clear that the statutory term "position of the United States" refers to the underlying agency action as well as the government's litigation position.

> of what the 1980 statute meant, or (2) an authoritative expression of what the 1985 Congress intended. It cannot, of course, be the former, since it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means. Nor can it reasonably be thought to be the latter—because it is not an explanation of any language that the 1985 Committee drafted, because on its face it accepts the 1980 meaning of the terms as subsisting, and because there is no indication whatever in the text or even the legislative history of the 1985 reenactment that Congress thought it was doing anything insofar as the present issue is concerned except reenacting and making permanent the 1980 legislation. (Quite obviously, reenacting precisely the same language would be a strange way to make a change.)

This analysis applies *a fortiori* here, where petitioner and amici rely only on strained implications from language in the 1985 House Report, which contains no statement directly supporting their interpretation of the reenacted statutory language.

Petitioner (Br. 20) and amicus ABA (Br. 15 & n.11) note that the House Committee disapproved of a variety of interpretations of EAJA, one of which it characterized as "overly technical." H.R. Rep. No. 120, *supra*, at 18 n.26. See note 21, *supra*. Nothing in the Committee's criticisms of these interpretations of unrelated provisions of the 1980 Act suggests a similar dissatisfaction with the interpretation of the "under section 554" language of Section 504 (b)(1)(C). Indeed, the failure, by contrast, to criticize the Attorney General's conclusion that INS

deportation proceedings are not covered by that definition suggests agreement with that conclusion.

Petitioner (Br. 21) and amici (ABA Br. 14; AILA Br. 13) also point to the statement in the House Report that social security administrative hearings "in which the Secretary is represented are covered by [EAJA]." H.R. Rep. No. 120, *supra*, at 10. They read that statement as implying that coverage under Section 554 is unnecessary, since it is an open question whether social security administrative proceedings are subject to the APA. See *Richardson* v. *Perales*, 402 U.S. 389, 409 (1971).[22] But no committee report—and certainly not Congress itself—made any statement denying the general applicability of the Section 554 criterion. To the contrary, Congress reenacted the "under section 554" requirement. In short, while the House Report stated that EAJA is applicable to social security proceedings in certain unusual circumstances (*i.e.*, where the Secretary's position is represented),[23] there is *no*

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[22] Indeed, Amicus ABA goes so far as to suggest (Br. 13-15) that the House Report demonstrates that *all* agency proceedings in which the government takes an adversary position are covered by the 1985 Act—even though the reference to Section 554 remains in the statute.

[23] The Third Circuit in *Clarke* observed that the 1985 legislative history "strongly suggests that Congress believed social security proceedings to be covered by section 554," 904 F.2d at 177. That belief would explain the remarks in the House Report. No such belief is plausible with respect to immigration proceedings, however. Although *Richardson* v. *Perales*, 402 U.S. at 409, had left the question open with respect to social security proceedings, this Court had expressly ruled in *Marcello* that administrative immigration proceedings are exempt from the APA. Thus, in the immigration area, in contrast to the social security area, there

statement at all regarding administrative immigration proceedings—notwithstanding the regulation previously promulgated by the Attorney General holding that EAJA does not cover administrative immigration proceedings.

C. The Statutory Purposes Of EAJA Are Consistent With Its Plain Language

Petitioner and amici rely upon general statements in EAJA and its legislative history that the purpose of the law is to encourage persons aggrieved by unjustified agency action to vindicate their rights undeterred by litigating expenses. See, *e.g.*, Pet. Br. 22; ABA Br. 9-10, 15.[24] But such generalities shed little light on the meaning of the specific statutory language involved in this case. This Court has previously had occasion to explain the dangers in an interpretive approach driven by resort to legislative purposes set forth at a high level of generality:

> The "plain purpose" of legislation * * * is determined in the first instance with reference to the plain language of the statute itself. Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon

was no longer even a live controversy regarding the question of APA coverage.

[24] Petitioner (Br. 13, 23-24) and amici (AILA Br. 17; ABA Br. 16-24) also suggest that an EAJA award should be available because the complexity of deportation proceedings and the vulnerability of those subject to them make the assistance of counsel particularly desirable. Such policy arguments are appropriately directed to Congress, not to the courts. See, *e.g.*, *Kosak* v. *United States*, 465 U.S. at 862; *Heckler* v. *Turner*, 470 U.S. 184, 212 (1985); *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987); *Escobar* v. *INS*, slip op. 10.

> to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means of effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Board of Governors of the Federal Reserve System v. *Dimension Financial Corp.*, 474 U.S. 361, 373-374 (1986) (citation omitted).

The "plain purpose" analysis of petitioner and amici provides an example of just this error. Under that analysis, the "general purpose" of EAJA could, despite carefully drafted legislative limitations, support application of EAJA in almost any administrative action in which government action is successfully challenged. The "basic purposes" upon which petitioner relies (Pet. Br. 10)—removal of economic disincentive to litigation, deterrence of unjustified government action, and encouragement of litigation to help formulate public policy—provide no meaningful limits, and take no account of the limitations Congress enacted. Thus, petitioner's "purpose" analysis would effectively swallow up the specific statutory limitations on EAJA's coverage. That is unsound interpretive methodology fundamentally incompatible with our democratic system. As this Court pointed out in *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987), "no legislation pursues its purposes at all costs." Instead, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of

legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Id.* at 526 (emphasis in original).

Here, an important part of the statutory purpose is, of course, reflected in the "under section 554" language itself. As the House Report on the 1980 Act states, "[i]n part, the decision to award fees only in adversary adjudications reflects a desire to narrow the scope of the bill in order to make its costs acceptable." H.R. Rep. No. 1418, *supra*, at 14.[25] Cf. *Hallstrom* v. *Tillamook County*, 110 S. Ct. at 310 ("legislative history indicates an intent to strike a balance"). Thus, it was eminently sensible for Congress to adopt a "bright-line rule" to determine EAJA's applicability (*St. Louis Fuel & Supply Co.*, 890 F.2d at 451; *Escobar*, slip op. 10; accord *Clarke*, 904 F.2d at 178), for the twin purposes of limiting the potential liability of the United States and eliminating the need for case-by-case litigation of the statute's applicability.[26]

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[25] Amicus ABA acknowledges that "[a]dministrative EAJA's limitation to adversary adjudications is also dictated, in part, by economics." ABA Br. 7 n.3 (citing House Report).

[26] In contrast, petitioner's "functionally equivalent" standard would make coverage turn on whether the proceeding in question "in substance, * * * was the functional equivalent of a proceeding under the APA." Pet. Br. 20. Cf. AILA Br. 12 (definition covers adversary "trial type" proceedings). Neither standard offers any way of determining precisely which features of the administrative proceeding are important in determining whether it is sufficiently similar to those subject to the APA to warrant coverage under EAJA. Such

In sum, there is no " 'clearly expressed legislative intention' contrary to [the] language [of the statute] which would require [the Court] to question the strong presumption that Congress expressed its intent" through the ordinary meaning of the language it chose. *Cardoza-Fonseca*, 480 U.S. at 432 n.12. "Under" Section 554 means "governed by" or "subject to" Section 554.

III. EAJA SHOULD NOT BE READ TO EFFECT A PARTIAL REPEAL OF 8 U.S.C. 1362

Section 292 of the Immigration and Nationality Act, 8 U.S.C. 1362, provides that "[i]n any exclusion

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vague and ill-defined standards constitute an open invitation to yet more litigation.

The interpretation urged by petitioner could thus reach well beyond the immigration proceedings at issue in this case. Petitioner's theory is that EAJA fees should be available in any statutorily mandated administrative proceeding determined by a court to be functionally equivalent to a Section 554 adjudication. This could include, *inter alia*, the proceedings of the Federal Energy Regulatory Commission at issue in *St. Louis Fuel & Supply Co.*, *supra*; the Department of Labor administrative proceedings under the Federal Employees Compensation Act at issue in *Owens* v. *Brock*, *supra*; and the proceedings of the Merit Systems Protection Board at issue in *Zeizel* v. *Pierce*, 784 F.2d 405, 407-408 (D.C. Cir. 1986). In addition, fees might also be available where an agency has voluntarily adopted APA-type procedures, although not compelled to do so by statute. But cf. *Smedberg Machine & Tool, Inc.* v. *Donovan*, 730 F.2d 1089 (7th Cir. 1984) (holding that labor certification proceedings before Department of Labor were not "under section 554" because hearings were not statutorily required). Under the theory advanced by amicus ABA, any administrative proceeding in which the government is represented would apparently be covered by EAJA—notwithstanding the "under section 554" language of 5 U.S.C. 504(b)(1)(C)(i).

or deportation proceedings * * * the person concerned shall have the privilege of being represented (*at no expense to the government*)" (emphasis added).[27] This provision further buttresses the court of appeals' holding that EAJA does not apply to deportation proceedings. Pet. App. A27-A34; *Clarke* v. *INS*, 904 F.2d at 177.

It is axiomatic that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974); *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Furthermore, "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Mancari*, 417 U.S. at 550.

In this case, there is neither an affirmative showing in EAJA of an intention to repeal the Immigration Act's flat prohibition on fee liability for deportation and exclusion proceedings, nor a showing that EAJA and the Section 1362 ban are irreconcilable. There is no "positive repugnancy" between EAJA and Section 1362 so that "they cannot mutually coexist." *Radzanower*, 426 U.S. at 155. Accordingly, the explicit, absolute bar to fee awards in immigration proceedings contained in Section 1362 should be regarded as a narrow exception to the general provisions of EAJA (even if those provisions could otherwise fairly be interpreted as expansively as petitioner contends). See *e.g.*, *Fourco Glass Co.* v.

[27] A similar provision is found in Section 242(b), 8 U.S.C. 1252(b), which sets forth the specific procedures governing the conduct of deportation proceedings.

Transmirra Prods. Corp., 353 U.S. 222, 228-229 (1957). This harmonization of the two statutes is consistent not only with fundamental canons of statutory construction, but also with the principle that waivers of sovereign immunity (such as EAJA) must be express and should be strictly construed—a principle that itself counsels against finding repeal by implication of a statute expressly refusing to waive sovereign immunity.

Ignoring these principles, petitioner and amicus AILA argue that EAJA creates an exception to the express ban on fee awards contained in Section 1362, because, they assert, Section 1362 is not a "fee-shifting" statute. Pet. Br. 28-29; AILA Br. 18-19. This argument rests on a misreading of the parallel EAJA provision in 28 U.S.C. 2412(d)(1)(A), which authorizes awards of attorney's fees under EAJA in civil actions "[e]xcept as otherwise specifically provided by statute." Because that provision was evidently designed to insure that EAJA would not restrict the more liberal fee-shifting provisions in other statutes, such as Title VII, Congress found it unnecessary to include similar language in the EAJA provisions dealing with attorney's fees in administrative adjudications. Nothing in either the civil action or administrative provisions of EAJA suggests that EAJA was intended to override the specific ban on fee shifting contained in 8 U.S.C. 1362.[28]

[28] Petitioner incorrectly analogizes to *Wolverton* v. *Heckler*, 726 F.2d 580 (9th Cir. 1984), a case involving the fee cap provision of the Social Security Act, 42 U.S.C. 406(b). In *Wolverton*, the court held that 42 U.S.C. 406(b) does not preclude an EAJA fee award because the Social Security Act "specifies only a limitation on the amount that a claimant must pay toward lawyers' fees." 726 F.2d at 582; accord

There is no indication whatever that EAJA was intended to abrogate 8 U.S.C. 1362, which specifically bars the award of attorney's fees in a particular type of proceeding. Instead, EAJA merely waived the common law rule against attorney's fees, to the extent that rule had not already been waived by specific attorney fee statutes permitting awards against the government. EAJA thus removed common law and sovereign immunity barriers, not an express provision barring fee shifting in a particular statutory scheme. See generally H.R. Rep. No. 1418, *supra*, at 8-9.[29]

Watford v. *Heckler*, 765 F.2d 1562, 1566 (11th Cir. 1985). In the instant case, in contrast, 8 U.S.C. 1362 expressly bars fee shifting, since it states that representation in administrative immigration proceedings shall be "at no expense to the Government." Thus, in the case at bar, unlike *Wolverton*, the fee statute in question does not in any way regulate "the amount that a claimant must pay toward lawers' fees"; instead, it explicitly prohibits requiring the government to pay the claimant's attorney fee.

[29] Amicus AILA (Br. 19-20) attempts to find significance for this purpose in Congress's disapproval of the holding of *Tulalip Tribes* v. *FERC*, 749 F.2d 1367 (9th Cir. 1984). See H.R. Rep. No. 120, *supra*, at 17. In *Tulalip*, the court relied upon 16 U.S.C. 825p, denying costs in proceedings under the Federal Power Act, to hold that an award of fees under EAJA was precluded. The court focused on the language of the "civil action" EAJA section, and reasoned that "no award of fees 'in addition to any costs awarded' [as there provided] is possible because no costs may be awarded." 749 F.2d at 1368. But 8 U.S.C. 1362, by contrast, does not merely deny costs. Instead, it states that the person concerned in an exclusion or deportation proceeding shall have the privilege of being represented, but "at no expense to the Government." There is, accordingly, no need here, as in *Tulalip*, to infer the unavailability of EAJA fees from the mere unavailability of *costs* under a different statute—because the statute at issue here expressly provides that *representation* in the proceedings in question shall be "at no expense to the Government." It follows that Congress's rejection of *Tulalip* in no way suggests that EAJA fees should be available in this case.

In sum, EAJA does not implicitly repeal the mandate of 8 U.S.C. 1362 that the representation in administrative deportation proceedings shall be "at no expense to the Government." For this additional reason, no EAJA award may be made for representation in such proceedings. Hence, the plain terms of not just one, but two federal statutes bar an award of attorney's fees in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 90-1141

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RAFEH-RAFIE ARDESTANI, Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. THE EAJA'S WAIVER OF SOVEREIGN IMMUNITY DOES NOT COMPEL AN INTERPRETATION THAT OVERRIDES THE STATUTE'S PURPOSES.

A. WAIVERS OF SOVEREIGN IMMUNITY MUST BE CONSTRUED IN CONTEXT WITH CONGRESSIONAL INTENT.

The principal argument advanced by Respondent Immigration and Naturalization Service ("INS") is that the plain language of the EAJA, narrowly construed as a waiver of sovereign immunity, indicates a Congressional intention to deny recovery of attorney's fees in deportation proceedings before immigration judges where the government has prosecuted without legal justification. (Res. Br. 7-13). For the reasons discussed in Petitioner's opening Brief, the plain language of the EAJA, applying to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing" (8 U.S.C. § 1252(b); 8 C.F.R. §§ 242.15-242.16), is met in deportation hearings; alternatively, the statutory language is subject to more than one interpretation. (*See* Pet. Br. 14-17). For the reasons discussed below, the Court should not invoke the convention of narrow construction, but instead should construe the statute to achieve its purposes.

The principle of construing narrowly waivers of sovereign immunity, does not compel a court to so construe a statute at the expense of defeating the statute's purpose.[1] Rather, the Court

[1]The INS has not identified an underlying policy furthered by the general rule of statutory construction it urges. Any suggestion that such a policy might be one of freeing the government from the burden of lawsuits would be inconsistent with and would undermine EAJA's fundamental goals of encouraging litigation to assure efficient and fair government conduct. *See* Thomas W. Holm, *Aliens' Alienation From Justice: The Equal Access to Justice Act Should Apply to Deportation Proceedings*, 75 Minn.L.Rev. 533-534 (1991).

should construe the statute "in light of its purpose 'to diminish the deterrent effect of seeking review of, or defending against, [unjustified] governmental action....'" *Sullivan v. Hudson*, 490 U.S. 877, 890 (1989). "[I]ntent to waive [sovereign] immunity and the scope of such a waiver can only be ascertained by reference to underlying Congressional policy." *Franchise Tax Board v. United States Postal Service*, 467 U.S. 512, 521 (1984). Courts "must be careful not to assume the authority to narrow the waiver that Congress intended, or construe the waiver unduly restrictively." *Irwin v. Veterans Administration*, ___ U.S. ___, 111 S.Ct. 453, 457, ___ L.Ed.2d ___ (1990), *citing*, *Bowen v. City of New York*, 476 U.S. 467, 479 (1986).

Modern jurisprudence contains numerous examples of properly refusing the government's request to invoke a narrow construction guide. In *Irwin*, this Court held that while a waiver of sovereign immunity "must be unequivocally expressed," and not simply implied, once Congress has made such a waiver, "a realistic assessment of legislative intent as well as a practically useful principal of interpretation," authorizes statutory construction beyond the narrowest plausible reading. *Id.* at 457.

In *Irwin*, an employment discrimination lawsuit was filed against the Veterans Administration, beyond the time statutorily allowed. The government agency urged that this filing deadline be construed strictly as a jurisdictional limit. This Court refused to be bound by a wooden guideline for statutory interpretation. This Court held that even if the statute had contained mandatory language (such as "every claim shall be barred unless the petition is filed within" a specified time), the Court would broadly construe the deadline to allow "equitable tolling" and other equitable defenses such as waiver and estoppel. *Id.* 111 S.Ct. 456-457.[2]

In *Franchise Tax Board*, this Court interpreted broadly "sue and be sued" and "settle and compromise claims" as applied to the

[2]Thus, the INS severely misconstrues *Irwin* in stating that the case merely stands for the proposition that a broad interpretation of a waiver of sovereign immunity may be made only when the effect is *de minimis*. (Res. Br. 8, n. 6).

government. Although that language could mean merely litigating in court and settling such court actions, the Court broadly construed the waiver of sovereign immunity to allow the government to be subjected to garnishment-like actions (rather than a complaint in a lawsuit) issued by an administrative agency (rather than by a court). 467 U.S. at 518, 521. The court held that:

> [the government's] crabbed construction of the statute overlooks our admonition that waiver of sovereign immunity is accomplished not by 'a ritualistic formula'; rather intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy.

Id. at 521.

The Court's analysis included a comparison of (a) court lawsuits and garnishment judgments, and (b) tax board orders to withhold. 467 U.S. at 522-523. The Court determined that there was "no meaningful difference" between the two (*id.* at 522) and that "in operation and effect" they were the same (*id.* at 523). Here, this type of analysis is appropriate both to the sovereign immunity inquiry and to the relevant statutory interpretation. As *Irwin* instructs, once Congress clearly has waived the government's immunity to fees, *see* 5 U.S.C. § 504, the statute should be construed like any other, with reference to Congressional intent. Moreover, as *Franchise Tax Board* teaches, there is no "meaningful difference" between an administrative adjudication "subject to" the APA and deportation proceedings, which are, in all practical respects, procedurally identical to APA adjudications.

B. THE DOCTRINE OF BROADLY INTERPRETING REMEDIAL STATUTES TO EFFECTUATE THEIR PURPOSES SUPPORTS THE APPLICABILITY OF EAJA TO DEPORTATION HEARINGS BEFORE IMMIGRATION JUDGES.

As a remedial statute, EAJA is entitled to an interpretation enabling its objectives to be accomplished. *Gomez v. Toledo*, 446

U.S. 635, 639 (1980); *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12-13 (1980); 3 J. Sutherland, *Statutes and Statutory Construction* § 62.01, at 55 (C. Sands 4th ed. 1972). As this Court has held, EAJA requires an endeavor to interpret the fee statute "in light of its purpose 'to diminish the deterrent effect of seeking review of, or defending against, [unjustified] governmental action....'" *Sullivan v. Hudson, supra* at 883-884; *see also Commissioner v. Jean*, ___ U.S. ___, 110 S.C. 2316, 2320-2323, ___ L.Ed.2d ___ (1990).[3]

II. THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES ("ACUS"), STATUTORILY DESIGNATED AS AN AUTHORITY CONCERNING EAJA IMPLEMENTATION, DID NOT GIVE ITS STAMP OF APPROVAL TO THE POSITION ADVOCATED BY INS, BUT INSTEAD URGED A BROAD INTERPRETATION OF THE STATUTORY LANGUAGE.

The EAJA recognizes the ACUS as an authority for its proper interpretation, and explicitly directs agencies to consult with the Chairman of the ACUS regarding implementation of the EAJA. 5 U.S.C. § 504(c)(1). The Chairman advised agencies to adopt a broad interpretation of "adjudications under Section 554" and to avoid technical disputes about whether a particular proceeding fell within the statute's coverage. *Office of the Chairman of the Administrative Conference of the United States Equal Access to Justice Act: Agency Implementation*, 46 Fed. Reg. 32,901.

The INS misconstrues the nature of ACUS's response to comments. (Res. Br. 21). ACUS responded to comments by revising its initial interpretation: that EAJA was applicable in instances where hearings were not required by statute (but merely were "provided at the discretion of the government"), and in instances where agencies are not required by statute to use procedures "*described in* section 554" (emphasis added). 46 Fed.

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[3]In its brief, the INS has ignored the doctrine of broadly construing a remedial statute to enable its objectives to be accomplished.

Reg. 32,901.[4] Indeed, in the same document cited by the INS, ACUS demonstrated that it did not retract its interpretation of Congressional intention that "questions of EAJA's coverage should turn on substance - the fact that the party has endured the burden and expense of a formal hearing - rather than technicalities." *Id.*[5] As explained in detail in Petitioner's opening Brief (Pet. Br. 18-19), the ACUS thus believed that the EAJA is applicable whenever an adjudication employs procedures similar to those defined in 5 U.S.C. § 554. That view is entitled to deference.

III. CONGRESS' EXPRESS APPLICATION OF EAJA TO CERTAIN SOCIAL SECURITY PROCEEDINGS DEMONSTRATES THAT TECHNICAL GOVERNANCE BY THE APA IS NOT NECESSARY.

Congress contemplated that EAJA would apply to certain Social Security cases regardless of whether they technically were "governed by" the APA, so long as they functionally met the definition of adversary adjudications. *See*, H.R. Rep. No. 120, 99th Cong. 1st Sess, *reprinted in* 1985 U.S. Code Cong. & Ad. News 138 ("While, generally, Social Security administrative hearings remain outside the scope of [section 504], those in which the Secretary [of Health and Human Services] is represented are covered by the Act.") *See also*, H.R.Conf.Rep. No. 1434, 96th Cong. 2d Sess, at 23, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5012 ("[the definition of adversary adjudication] precludes an award in a situation where an agency, e.g., the Social Security Administration, does not take a position in the adjudication.... If, however[,] the agency does take a position at some point in the adjudication, the adjudication would then become adversarial."). Congress was not

[4]By addressing procedures "*described in* section 554," ACUS demonstrated its interpretation that EAJA applies to proceedings "described in" or "defined in" section 554, rather than just to those "governed by the APA." 46 Fed. Reg. 32,901.

[5]The Department of Justice itself noted that the ACUS was critical of its departures from the ACUS model rules. 47 Fed. Reg. 15,774 (1982).

concerned that *Richardson v. Perales*, 402 U.S. 389 (1971), expressly had declined to settle the controversy about whether Social Security proceedings were governed by the APA or by a more specialized version of the APA such as the Social Security Act (or the INA); Congress was concerned only that the hearings are of the type defined in section 554. *Escobar Ruiz v. INS*, 838 F.2d 1020, 1027 (9th Cir. 1988) (*en banc*). The suggestion by INS that Congress even considered, let alone resolved, the long-standing arcane legal controversy about whether Social Security hearings are governed by the APA, is improbable. (Res. Br. 25 n. 23).

IV. PETITIONER'S TEST IS COMPATIBLE WITH THE EAJA'S GENERAL PURPOSES, PROVIDES A MEANINGFUL "BRIGHT-LINE RULE," AND SETS APPROPRIATE LIMITS.

The INS has suggested that looking to the statute's purposes and goals to glean the proper construction of EAJA's "under Section 554" language might require EAJA to apply "in almost any administrative action in which government action is successfully challenged." (Res. Br. at 27). INS also has asserted that curtailing costs and adopting a "bright-line rule" for applicability are the statutory purposes served by the interpretation it now urges.

EAJA awards are not authorized merely when government action is successfully challenged: they may be awarded only when the government's position in an adversary adjudication was not substantially justified. 5 U.S.C. § 504(a)(1). The statute further limits its applicability to those cases where the position of the government is represented by counsel or otherwise (5 U.S.C. § 504(b)(1)(C)).[6]

In *Commissioner v. Jean, supra*, this Court held "[t]he Government's general interest in protecting the federal fisc is

[6]Moreover, an EAJA applicant must meet certain financial limitations. 5 U.S.C. § 504(b)(1)(B), and an award may be reduced or denied in cases where an applicant has unreasonably protracted the proceedings. 5 U.S.C. § 504(a)(3).

subordinate to the [EAJA's] specific statutory goals of encouraging private parties to vindicate their rights and 'curbing excessive regulation and the unreasonable exercise of Government authority.'" *Id.* at 2322, *citing* H.Rep. No. 96-1418, p. 12 (1980). The monetary cost to the government for EAJA awards is discussed in the Brief of *Amicus Curiae* American Bar Association at page 17-18, n. 12, and A5. *See also Commissioner v. Jean, supra* at 2322 n. 12, 13. The enormous difference between the sums budgeted by Congress for implementation of EAJA (originally $100 million per year) and the actual expense experienced or later forecast ($1.3 million to $7 million per year), *see* H. Rep. No. 120, 99th Cong., 1st Sess. at 3, 8-9 (1985) itself indicates that a broader implementation of EAJA was intended than has been effectuated.

The "bright-line" promised by INS is an illusion (Res. Br. 28). The suggestion that EAJA's purposes are furthered by adopting the "governed by/subject to Section 554" interpretation because it makes determination of applicability simple, is undermined by the difficulty litigants and courts have had in determining whether the Administrative Procedure Act governs a particular agency adjudication. Exemptions from the APA are determined by an analysis of the statutory language; there must be an express negation of an APA provision in order for a provision of another statute to supersede it. 5 U.S.C. § 1011 (1952). This, of course, leads to case-by-case analyses, and can prove extraordinarily difficult. *Compare, Marcello*, 349 U.S. 302, 308-310 *with id.* at 315-318 (Black, J., dissenting).[7]

[7]For example, in *Van Teslaar v. Bender*, 365 F. Supp. 1007 (D. Md., 1973), the court completed a functional analysis of a Coast Guard administrative proceeding, and concluded that since the proceeding was "required by statute to be determined on the record after opportunity for an agency hearing," the Administrative Procedure Act therefore must apply. *Id.* at 1011. *See also, Blackwell College of Business v. Attorney General*, 454 F.2d 928 (D.C. Cir., 1971) [holding that the INS is an "agency" within the terms of the Administrative Procedure Act, and is therefore subject to APA requirements. *Id.* at 933] *See also, Richardson v. Perales, supra.*

A practicable "bright-line" is achievable, however, by adoption of the functional analysis of the "as defined in Section 554" interpretation. If a proceeding satisfies the requirements of Section 554: (1) a statute mandating an agency to have a hearing on the record, and (2) the government is represented by counsel, then EAJA may apply. This is a "bright-line" because the statute on its face would specify: whether a hearing or proceeding is required [as in deportation proceedings (8 U.S.C. § 1252(b) (1988)]; and whether the hearing must be on the record [as in 8 U.S.C. § 1252(b)]. The representation of the government by counsel or otherwise may be determined readily by seeing whether the record shows the presence of an advocate for the government's position. *See,* Holm, *supra,* at 536-537.

V. THE INS ITSELF HAS INTERPRETED SECTION 292 NOT TO BE A GENERAL BAR TO GOVERNMENT-PAID REPRESENTATION FOR ALIENS

Petitioner's Opening Brief addressed the appropriate function of Section 292 of the INA (8 U.S.C. § 1362), and its compatibility with a functional and goal-fulfilling interpretation of the EAJA (Pet. Br. 28-30). In its brief, the INS erroneously has described the parenthetical language in Section 292 as an "absolute bar" to government-paid representation (Res. Br. 30).[8]

The INS itself, however, has rejected such a broad reading of the parenthetical language: its own regulations require immigration judges to advise aliens about the availability of free legal services programs. 8 C.F.R. § 242.16(a) (1990). At the time the regulations originally were issued, the INS noted that many legal services organizations are funded with government money, and stated that it found "no conflict between the limitation in section 292 of the Act and the availability of free legal services rendered by those organizations which are recipients of funds provided by certain *Federal agencies or the Legal Services*

[8]Accord, *Hashim v. Immigration and Naturalization*, ___ F.2d ___, No. 90-4125 (2d Cir. June 25, 1991).

Corporation." (emphasis added) 44 Fed. Reg. 4652 (1979). *See also* Holm, *supra* at 523 n. 141.

CONCLUSION

For the reasons stated above, and in the Petitioner's opening Brief, the judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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Dated: July 17, 1991

(4)

No. 90-1141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RAFEH-RAFIE ARDESTANI,

Petitioner,

—v.—

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The American Bar Association ("ABA") is a voluntary, national membership organization of the legal profession. Its over 360,000 members come from every state and territory and the District of Columbia. The ABA's constituency includes prosecutors, public defenders, attorneys in private practice, trial and appellate judges on the state and federal levels, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer "associates" in related fields.

The ABA has a longstanding interest in the Equal Access to Justice Act ("EAJA" or "Act"). The ABA participated in the debates leading to its passage and strongly supported its enactment as an incentive to responsible government action and as a means to ensure that individuals have access to legal services. The ABA was also an early supporter of the Administrative Procedure Act ("APA") and assisted in the APA's drafting and development.

The ABA also has an historic interest in immigration policy issues and in the fair enforcement and implementation of our nation's immigration and refugee laws. Consistent with these principles, and to help implement them, the ABA's policymaking House of Delegates created the Coordinating Committee on Immigration Law in 1983. This Committee, made up of representatives of nine ABA entities with specialized expertise (*e.g.*, administrative law), has assisted in organizing numerous *pro bono* immigration representation efforts and trained volunteer attorneys from the private bar to counsel aliens and represent them in the context of deportation and other proceedings before the Immigration and Naturalization Service ("INS"). The ABA supports the application of the EAJA to deportation proceedings as an important incentive that is consistent with these efforts and with the fundamental purposes of the Act.

The ABA appears as *amicus curiae* in the case because Petitioner raises an issue that is critical to the continued operation of the EAJA as a means of access to justice in administrative proceedings. The ABA has received the consent of all parties to this case.*

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* Three "of counsel" on this brief are attorneys in a law firm which represents petitioner in *Hashim v. INS*, U.S. Court of Appeals for the Second Circuit (Docket No. 90-4125, decision pending after argument). None participated in the briefing or prosecution of that matter in which Hashim urges that EAJA apply to deportation proceedings. That issue has not been decided in the Second Circuit.

SUMMARY OF ARGUMENT

1. Deportation proceedings, which are substantially identical to the adversary adjudications defined by Section 554 of the Administrative Procedure Act ("APA"), are subject to the EAJA. The statute and legislative history of the EAJA distinguish adversarial adjudications from non-adversarial proceedings, such as rulemaking, and Section 554 is used in the EAJA as a guide to that distinction. Interpreting "under Section 554" to mean "as defined by" Section 554 furthers the explicit congressional intent to limit the EAJA to adversarial contexts. In contrast, interpreting the phrase "under Section 554" to mean "subject to Section 554" would exempt agencies from EAJA's remedial mechanisms on the wholly arbitrary basis of the formal relationship of an agency's governing statute to the APA. This result would subvert the fundamental purpose of the EAJA, which is to create access to the adjudicatory system for individuals unjustifiably aggrieved by any governmental agency.

2. Deportation proceedings epitomize the situation the EAJA was designed to address. Individuals who are frequently indigent, often unskilled in the English language, and untutored in this country's basic customs and institutions must navigate a baffling regulatory system to obtain fundamental rights in complex legal proceedings where process often determines the outcome. They are pitted against an agency whose policies and actions have been the target of frequent criticism. And they are largely unrepresented by counsel in circumstances where counsel has been demonstrated to make a significant difference.

ARGUMENT

The Petitioner is a sixty-two-year-old Iranian woman who prevailed in administrative deportation proceedings brought on by order to show cause by the Immigration and Naturalization Service ("INS"). A hearing was held in an Immigration Court. An Immigration Judge presided. Her claim was

opposed by a government "trial attorney." Live testimony was taken and documents were placed in evidence. A contemporaneous record of proceedings was made. A decision was made based on the record. In short, there was an adjudication after trial.

For two and a half years, Petitioner's request for political asylum was opposed "even though the INS knew that the State Department had determined that [she] had a well founded fear of persecution." *Ardestani v. United States Dep't of Justice, INS*, 904 F.2d 1505, 1515 (11th Cir.) (Pittman, J., dissenting), *reh'g denied*, 915 F.2d 698 (11th Cir. 1990), *cert. granted*, 111 S. Ct. 1101 (1991).[1] Without similar determination and resources, others entitled to statutory benefits would earlier on have abandoned the process and been deported.

To benefit persons who "may be deterred from seeking review of, or defending against, unreasonable government action because of the expense involved in securing the vindication of their rights in civil actions and administrative proceedings," Congress enacted the Equal Access to Justice Act ("EAJA" or "Act"). Congressional Findings and Purposes, note following 5 U.S.C. § 504.

EAJA provides reasonable counsel fees to those who prevail over government opposition that is substantially unjustified. Its fee-shifting mechanism applies to civil actions. 28 U.S.C. § 2412(d) ("civil EAJA"). It also gives relief to persons who prevail in administrative proceedings. 5 U.S.C. § 504 ("Section 504" or "administrative EAJA"). Nonetheless, the INS consistently opposes the application of administrative EAJA to its agency proceedings, often on hypertechnical grounds. It seeks to defeat, in adversarial proceedings, use of this important remedial legislation by a class of statutory beneficiaries who are often poor, who are unsophisticated about legal matters, who face drastic conse-

1 To avoid burdening the Court with repetitive statements, Amicus ABA respectfully directs the Court to the briefs filed by the parties for a statement of the relevant facts and statutory texts.

quences from the misapplication of law or the failure to document adequately a hearing record, and who are largely unrepresented. As set forth below, this Court should hold that EAJA applies to INS deportation proceedings.

I. THE STATUTE BY ITS TERMS CLEARLY ENCOMPASSES THE ADVERSARY ADJUDICATIONS EMBODIED IN DEPORTATION PROCEEDINGS

Section 504 directs "[a]n agency that conducts an adversary adjudication" to shift the fees and costs incurred in prevailing against the United States in that adjudication when the position of the United States was not substantially justified. 5 U.S.C. § 504(a)(1). The relevant definitional provision of Section 504 states that " 'adversary adjudication' means . . . an adjudication under Section 554 of [the Administrative Procedure Act ("APA")] in which the position of the United States is represented by counsel or otherwise. . . ." 5 U.S.C. § 504(b)(1)(C).

The heart of the conflict among the circuits as to whether deportation proceedings fall within the ambit of Section 504 appears to be a debate over the semantics of the word "under." The procedures for deportation hearings are substantially identical to the procedures "defined under" the APA; however, INS procedures are set forth "under the authority" of the Immigration and Nationality Act ("INA"), rendering the APA redundant.[2] *Compare Escobar Ruiz v. INS*, 838 F.2d 1020, 1024 (9th Cir. 1988) (en banc) (" 'an adjudication under Section 554' means 'an adjudication as defined by Section 554' "); *and Clarke v. INS*, 904 F.2d 172,

2 The procedural requisites for deportation hearings were modelled after the procedures set forth in the APA and conform to them in all major respects. *See Marcello v. Bonds*, 349 U.S. 302, *reh'g denied*, 350 U.S. 856 (1955) *and* 8 C.F.R. §§ 2.1, 3.0 and 100.1-100.2 (1990) (as amended), which eliminated the difference between INA and APA procedures that was the sole issue in *Marcello*. *Compare* 5 U.S.C. §§ 554-557 (from the APA) with 8 U.S.C. § 1252(b) (from the INA) and implementing regulations at 8 C.F.R. pts. 3, 242 (1990) (as amended).

178 (3d Cir. 1990) (the "meaning of ['under Section 554'] is that the EAJA is to apply only to those proceedings conducted under the authority of Section 554").

The proper interpretation of "under Section 554" is "as defined by." The phrase appears in the section of the statute that defines the proceedings to which administrative EAJA applies, and functions there as a definition of the characteristics of those proceedings—i.e., adversarial adjudications, as distinguished from rulemaking or other non-adversarial proceedings. In this role, the term "under Section 554" supports the legislative text and history. Indeed, it is only with this construction that the phrase may operate without subverting the fundamental purposes of the EAJA.

The EAJA is founded equally on the premises that: (1) it is in the public interest to challenge unreasonable government action; and (2) it is expensive to litigate against the government:

> [The EAJA] focuses primarily on those individuals for whom cost may be a deterrent to vindicating their rights. The bill rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy.

H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4984, 4988. The EAJA's remedial mechanism is therefore designed to function in settings where the government acts as an adversary.

In civil EAJA, the limitation to adversary proceedings is self-defining because a civil litigation is always adversarial. In administrative EAJA, the limitation must be made explicit, not only as consonant with the Act's overall function, but also on grounds of fairness. While the EAJA seeks to level the playing field, it is only fair that the government be represented on that playing field:

> The bill . . . limit[s] administrative proceedings to "adversary adjudications" in which the position of the U.S. is represented. It is basic fairness that the United States not be liable in an administrative proceeding in which its interests are not represented.

H.R. Rep. No. 1418, *supra*, at 11-12.[3] The role of Section 554 as a guide to the procedural characteristics that make a proceeding an "adversary adjudication" for purposes of administrative EAJA furthers congressional efforts to provide a parallel for civil EAJA in the context of administrative remedies.

In contrast, defining "under Section 554" to mean "subject to" or "under the authority of" does not distinguish among types of proceedings; rather, it only would distinguish among different agencies.[4] A proceeding held "under the authority of" Section 554 is not only a proceeding with certain substantive characteristics, it is a proceeding conducted only by agencies who are technically subject to the APA, even though other agencies' governing statutes provide for equivalent formal hearings. Thus, any agency whose governing statute can be read to mandate adherence to the APA would be covered by the EAJA, but if its governing statute deviates from or supercedes the APA, the EAJA would not apply—even if the procedural context gives the claimant the same or greater procedural protections against the agency than does the APA.

That result, clearly not compelled by the statutory language, is wholly at odds with "the specific statutory goals of encouraging private parties to vindicate their rights and 'curbing excessive regulation and the unreasonable exercise of

---

3 Administrative EAJA's limitation to adversary adjudications is also dictated, in part, by economics:

> In part, the decision to award fees only in adversary adjudications reflects a desire to narrow the scope of the bill in order to make its costs acceptable.

H.R. Rep. No. 1418, *supra*, at 14.

4 By this definitional exercise, EAJA's application would be narrowed, as INS argues in this case. However, Congress expressly rejected a "subject to" provision, and this Court should not impose one by *post hoc* decision. *See infra* at p. 12 & n.9.

Government authority.' " *Commissioner, INS v. Jean*, 110 S. Ct. 2316, 2322 (1990), quoting H.R. Rep. No. 1418, *supra*, at 12 (emphasis added). It places certain agencies entirely outside of the reach of administrative EAJA, not on grounds of any reasoned policy or presumption, but solely on the basis of the formal—and often indistinct—relationship between that agency's governing statute and the APA.[5]

There is not a shred of support anywhere in the EAJA's legislative text or history for finding a congressional intent to apply EAJA's reforms to anything less than the government as a whole. The statute and legislative history refer throughout to "the Government," the "United States" or "federal agencies."[6] Section 504 itself applies to "an agency," which is defined to mean "*each authority of the Government of the United States*, whether or not it is within or subject to review by another agency. . . ." 5 U.S.C. § 551 (emphasis added). *See* 5 U.S.C. § 504(b)(2) ("the definitions provided in section 551 of this title apply to this section").[7]

Although the phrase "under section 554" appears in the statute, and occasionally in the legislative history, these

5 In the context of deportation proceedings, for example, this Court held in *Marcello v. Bonds*, 349 U.S. at 310, that where detailed and specific INA procedures deviate from the APA, the INA applies. Because the Court termed this relationship an "exemption" from the APA, even though the deviation at issue in *Marcello* has since been eliminated by regulation, the INS has asserted wholesale immunity from EAJA awards in its administrative adversarial adjudications. The principles underlying a congressional effort to protect parties to administrative proceedings by legislating protections equivalent to those set forth in the APA simply cannot be reconciled with an exercise in statutory construction of the EAJA that *deprives* those same parties of the EAJA's incentive to minimally responsible agency action.

6 The preface to the EAJA states that "[i]t is the purpose of this title . . . to diminish the deterrent effect of seeking review of, or defending against *governmental* action. . . ." Congressional Findings and Purposes, note following 5 U.S.C. § 504.

7 Section 551 exempts from the definition of agency the Congress, courts, and local and military authorities, which is consistent with administrative EAJA's function as a remedy in administrative settings.

sources contain no discussion of technical issues of governance, and for the most part make no reference to Section 554 in connection with administrative EAJA. Rather, the legislative materials repeatedly conjoin administrative EAJA's "adjudications" and civil EAJA's "actions," emphasizing both the generality of Section 504's application vis-a-vis the government, and the specificity of an adjudication's nature as adversarial.

The House Report describes the inception of the bill as an effort to shift fees in adversarial proceedings:

> During the 96th Congress, several bills were introduced in both houses to expand the liability of the United States for attorneys fees *when it loses an administrative proceeding or a civil action.*

H.R. Rep. No. 1418, *supra*, at 6 (emphasis added).

The statements of general purpose contained in both the House and Senate Reports define a reach of administrative EAJA that is qualified only by the adversarial nature of proceedings. Pointedly, Congress does not refer to the APA or use the defined term "adversary adjudication." Rather, Congress uses interchangeably the terms "adjudication," and "administrative adjudication" in contexts that emphasize the adversarial nature of the proceedings in question:

> Under [the Act] certain *parties who prevail in administrative adjudications or civil actions brought by or against the United States* will be entitled to attorney fees and related costs unless the Government action was substantially justified.
>
> . . . .
>
> *An adjudication or civil action provides a concrete, adversarial test* of Government regulation and thereby ensures the legitimacy and fairness of the law. *An adjudication, for example, may show that the policy or factual foundation underlying an agency rule is erroneous or inaccurate*, or it may provide a vehicle for developing or announcing more precise rules. The bill thus recog-

> nizes that the expense of correcting error on the part of the Government should not rest wholly *on the party whose willingness to litigate or adjudicate* has helped define the limits of Federal authority.

S. Rep. No. 253, 96th Cong., 1st Sess. 4, 6 (1979) (emphasis added); *see also* H. Rep. No. 1418, *supra*, at 9, 10.

The statement of the purpose of administrative EAJA set forth in paragraph 14 of the Conference Report on the EAJA as enacted in 1981 is similarly unencumbered by any reference to issues of technical governance or distinctions among agencies:

> The . . . bill requires a Federal agency or department *that conducts an adversary adjudication* to award to a prevailing party other than the United States fees and other expenses. . . .
>
> . . . .
>
> The *conferees direct the United States to pay attorney fees* and other expenses to a prevailing party other than the United States *in an agency adversarial adjudication* unless the position of the government is found to be not [sic] substantially justified or where special circumstances make the award unjust. *An adversarial adjudication is one in which the agency position is represented by counsel or otherwise.*

H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 21, *reprinted in* 1980 U.S. Code Cong. & Admin. News 5003, 5010 (emphasis added).[8]

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8 Several legislators, including a co-sponsor of the bill, state these themes plainly:

> This bill would . . . combat the growing tendency of escalating legal and related costs deterring [individuals] from *enforcing and defending their legal rights against the Federal Government in its regulatory capacity.*
>
> *The basic problem to overcome is the inability . . . to combat the vast resources of the Government in administrative adjudication.* In the usual case, a party has to weigh the high cost of litigation or agency proceedings against the value of rights to be asserted.

125 Cong. Rec. 21,435, 21,437 (1979) (statement of Sen. Domenici, co-sponsor of the EAJA) (emphasis added).

> Ironically, it appears that American justice has become too costly for the average American budget. The cost of attorneys fees, *the cost of putting together a case and seeing it through an administrative proceeding* or the courts, the cost of paying expert witnesses and developing facts, can all come to much more than the cost of simply giving in. . . . This bill seeks to create an atmosphere in which citizens are not intimidated by litigation cost.

125 Cong. Rec. 21,435, 21,436 (1979) (statement of Sen. Dole) (emphasis added).

> Under the current provisions of the Equal Access to Justice Act, *administrative proceedings where the Government is represented by counsel are covered.*

131 Cong. Rec. S9994 (daily ed. July 24, 1985) (statement of Sen. Heflin) (emphasis added).

In the context of these unambiguous statements of the intended function of the EAJA, Congressional reference to Section 554 should only be read as a guide to the procedural characteristics of an "adversarial administrative proceeding." There is simply no basis in Congress' expansive statement of purpose to infer from any statutory language an intent to exclude agencies from EAJA's reach. Even when Section 554 appears in the section-by-section analysis of the Committee Reports, it is used to define categories of proceedings and not categories of agencies:

> The section covers *only* ["adversary" included in House Report] *adjudications* under 554 of title 5 and *not rulemaking or other administrative proceedings.* In part, the decision to award fees *only in agency* ["adversary" in House Report] *adjudications* reflects a desire to narrow the scope of the bill in order to make its costs acceptable. It also reflects a desire to limit the award of fees to situations where participants have a concrete interest at stake but nevertheless may be deterred from asserting or defending that interest because of the time and expense involved in pursuing administrative remedies. *In these*

> *situations, in order to insure that individuals will actively seek to protect their rights vis-a-vis the government, they must have the opportunity to recover the costs of litigating.* An administrative remedy in these circumstances cannot be truly effective unless a prevailing party is made whole.

S. Rep. No. 253, *supra*, at 15-16; H.R. Rep. No. 1418, *supra*, at 14 (emphasis added).

That section-by-section analysis uses Section 554 to distinguish adversary adjudications from rulemaking, and throughout is concerned with defining those proceedings where a party would need to "recover the costs of litigating." *Id.* There is nothing in the section-by-section analysis or elsewhere in the legislative history to indicate that Congress considered "participants [with] a concrete interest at stake" to be distinguishable according to the identity of the agency affecting that interest. *Id.*

The joint explanatory statement issued by the Conference Committee on EAJA as enacted in 1981 confirms Section 554's role in distinguishing proceedings rather than agencies. The Committee states that the Act "defines adversary adjudication as an agency adjudication *defined under* the Administrative Procedures Act where the agency takes a position through representation by counsel or otherwise." H.R. Conf. Rep. No. 1434, *supra*, at 23. Any question as to whether "defined under" might mean "subject to" is removed by the fact that this statement appears in the Committee's explanation of its substitution of "under" for the Senate language "subject to."[9]

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9 The Senate version of the bill incorporated "subject to Section 554" not only in the definitional provisions of Section 504, but also in the operative text. The Senate version contained a Section 504(a) that stated "[a]n agency *that conducts an adjudication subject to section 554* of this title shall award . . . ." and a definitional section 504(b)(1)(C) that stated in its entirety: " 'adjudication subject to section 554 of this title' does not include adjudication for the purposes of establishing or fixing a rate or for the purposes of granting or renewing a license." *See* S. Rep. No. 253, *supra*, at 24.

There is no economy of language effected by Congress' removal of the language "subject to." *Contra St. Louis Fuel and Supply Co. v. FERC*, 890 F.2d 446, 450 (D.C. Cir. 1989). The conference replaced thirty-eight words with forty-nine words. Of the original thirty-eight words, only the words "subject to" do not re-appear. Of the forty-nine replacement words, the words that are new are "adversary," "under"—which is stated by the Conference Committee to mean "defined under"—and "in which the position of the United States is represented by counsel." Perhaps Congress' intention to refer to the substance rather than the reach of Section 554 could be stated more clearly, but "under" obviously is a more encompassing formula than "subject to," and, if it meant only "subject to," there was no need for the substitution. *Cf. Marcello v. Bonds*, 349 U.S. at 309 ("Were the courts to ignore these provisions . . . the painstaking efforts detailed above would be completely meaningless.").

Any inference of a congressional intent to distinguish among agencies subject to the EAJA by virtue of their relationship to the APA is further—and thoroughly—undermined by the Conference Report's use of Social Security Administration proceedings to illustrate the intended meaning of "adversary adjudication." *See* H.R. Conf. Rep. No. 1434, *supra*, at 23. Congress surely was aware that this Court has declined to resolve a debate as to whether the APA governs Social Security disability claims. *See Richardson v. Perales*, 402 U.S. 389, 409 (1971) ("[W]e need not decide whether the APA has general application to social security disability claims, for the social security administration procedure does not vary from that prescribed by the APA.").

Indeed, the Conference Report's explicit reference to the Social Security Administration can only be read to indicate Congress' exclusive concern with the distinction between adversarial and non-adversarial proceedings:

> It is intended that this definition precludes an award in a situation where an agency, e.g., the Social Security Administration, does not take a position in the adjudica-

> tion. If, however, the agency does take a position at some point in the adjudication, the adjudication would then become adversarial.

H.R. Conf. Rep. No. 1434, *supra*, at 23. There is no discussion of technical issues of governance here. Rather, Congress unambiguously describes the difference between proceedings in which the agency is acting as an adversary and those in which it is not.

In re-enacting the EAJA in 1985, Congress reiterated the Act's application to Social Security proceedings, describing hearings in which the agency is represented before an administrative law judge as "precisely the type of situation covered"—language that again relates to the substance of procedures and ignores technical issues of authority under the APA:

> One issue which needs clarification is what coverage, if any, is allowed under the Equal Access to Justice Act for Social Security Administration hearings at the administrative level. As enacted in 1980, *the Act covers "adversary adjudications"*—i.e., an adjudication under Section 554 of [the APA] "in which the position of the United States is represented by counsel or otherwise." . . . It is the committee's understanding that the Secretary of Health and Human Services has implemented an experiment in five locations in which the Secretary is represented at the hearing before the administrative law judge. *This is precisely the type of situation covered by Section 504(b)(1)(C). While, generally, Social Security administrative hearings remain outside the scope of this statute, those in which the Secretary is represented are covered by the Act.*

H.R. Rep. No. 120, 99th Cong., 1st Sess., pt. 1, at 10, *reprinted in* 1985 U.S. Code Cong. & Admin. News 132, 138 (emphasis added).[10]

10 At the time, the EAJA's application to INS deportation proceedings had not been adjudicated. This would explain the absence of specific references to such proceedings in the 1985 legislative materials.

The remedial purpose of the EAJA is to encourage persons aggrieved by agency action to vindicate their rights undeterred by the expense of litigating against the government. *See generally* H.R. Rep. No. 1418, *supra*; S. Rep. No. 253, *supra*; *Commissioner, INS v. Jean*, 110 S. Ct. 2316 (1990). Congress itself has expressed dissatisfaction with overly narrow interpretation of the EAJA.[11] "It is the plain duty of the courts . . . to construe . . . remedial legislation to eliminate, so far as its text permits, the practices it condemns." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 45, *modified on other grounds*, 339 U.S. 908 (1950).

Section 504's specific purpose is to create a fee-shifting incentive in the context of adversary adjudications where the government is represented by counsel or otherwise—proceedings that are distinguishable from other administrative proceedings by procedural characteristics and degree of burden and expense. It would utterly disserve this purpose to distinguish among agencies by reference to debated technicalities—and thereby create for INS an immunity to the EAJA's remedial incentive that was neither expressed nor intended.

II. IMMIGRATION HEARINGS EPITOMIZE THE CIRCUMSTANCES IN WHICH THE EAJA WAS INTENDED TO APPLY

Deportable aliens face the most severe measure that can be meted out by a federal agency. In the words of Justice Brandeis, deportation may "result . . . in loss of both property and life, or of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). *See also Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947); *Bridges v. Wixon*, 326

11 *See, e.g.*, H.R. Rep. No. 120, *supra*, at 9 (in reporting that EAJA awards totalling $3.9 million since the inception of the Act were "dramatically less than the $100 million annual cost estimated by the Congressional [Budget] Office . . . and higher amounts predicted by the Justice Department," Congress noted with dissatisfaction that "[p]art of the problem in implementing the Act has been that agencies and courts are misconstruing the Act").

U.S. 135, 154 (1945). Its consequences are even graver when a deportation order erroneously rejects a claim for political asylum, as this Court observed in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987): "[d]eportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country."

Applicants for political asylum are uniquely vulnerable to abusive or unreasonable agency practices. They are frequently lacking in education, command of the English language, and the most basic familiarity with this country's customs and institutions. Yet, to obtain their rights, aliens must navigate "a baffling skein of provisions" resembling "King Minos's labyrinth in ancient Crete," *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977). And they must often do so without the guidance of counsel to a degree that demonstrably results in injustice.

Asylum applicants are frequently indigent and are generally ineligible for representation by legal services offices using Legal Services Corporation funding. *See* 45 C.F.R. §§ 1626.3, 1626.4 (1990). Unofficial estimates provided by the Lawyers Committee for Human Rights and a government official at the Executive Office for Immigration Review ("EOIR"), the body in charge of the Immigration Courts, suggest that one-third to one-half of all asylum applicants are unrepresented by counsel. *See* Anker, *Determining Asylum Claims in the United States: Summary Report of an Empirical Study of the Adjudication of Asylum Claims Before the Immigration Court*, 2 Int'l J. Refugee L. 252, 261 (1990) ("Anker Study").

The problem of representation is aggravated by the growing number of asylum seekers who are detained in remote areas of the country. An ABA delegation to facilities in South Texas where thousands of aliens are detained found that:

> There are currently only two and a half full time pro bono lawyers who counsel and represent asylum applicants in South Texas and a handful of legal assistants

> and private attorneys to support them. All the programs and legal representatives with whom we met are deeply troubled that thousands of prospective applicants are unaware of their rights and that only the most persistent or resourceful individuals can succeed in securing legal assistance.

ABA Coordinating Committee on Immigration Law, *Lives on the Line: Seeking Asylum in South Texas* (ABA, July 1989) ("ABA Asylum Report") at 18. (Copies of this document have been lodged with the Clerk of the Court.)

In summary, the delegation found that:

> The level of available free legal representation is grossly inadequate given the size of the detained population. Effective representation is further impeded by the distances between detention facilities, limitations on access to detainees, and multiple court locations.

Id. at 19.

In detention centers located at El Centro, California, Florence, Arizona, and Oakdale, Louisiana, another study found that "there has rarely been available more than one attorney at any given time to represent the hundreds of aliens in need of representation on a pro bono basis; those attorneys available are hopelessly backlogged and unable to represent adequately the large numbers of aliens needing representation." Note, *INS Transfer Policy: Interference with Detained Aliens' Due Process Right to Retain Counsel*, 100 Harv. L. Rev. 2001, 2005 (1987).[12]

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12 The application for fees in this case seeks to charge the government with the legal expenses only of that small percentage of applicants who would otherwise be unable to press *meritorious* claims, and then only when the applicant can demonstrate that the agency's opposition lacked substantial justification. *See* 5 U.S.C. § 504(a)(1). The Act also provides that an award may be reduced or denied when an EAJA applicant has "engaged in conduct which unduly and unreasonably protracted final resolution of the matter in controversy." 5 U.S.C. § 504(a)(3). The statute is thus carefully tailored to shift fees only

In *Powell v. Alabama*, 287 U.S. 45, 69 (1932), this Court observed that "[e]ven the intelligent and educated layman . . . requires the guiding hand of counsel at every step in the proceedings against him." In deportation proceedings, both the perils of the system and the vulnerabilities of the participants are heightened enormously. The ABA has direct experience in deportation proceedings. After working with a major *pro bono* effort for those in deportation proceedings detained in South Texas, an ABA delegation concluded that "[u]nrepresented applicants who lack a knowledge of English language and our legal system face almost insuperable barriers to achieving asylum." ABA Asylum Report at 19.

The complexity of the immigration code is legendary, and it bears on a segment of our society that is ill-equipped to comprehend it:

> Whatever guidance the regulations furnish to those cognoscenti familiar with INS procedures, this court, despite many years of legal experience, finds that they yield up meaning only grudgingly and that morsels of comprehension must be pried from mollusks of jargon. There is nothing esoteric about the subject matter. The

when that would serve both to vindicate meritorious claims and to call an unreasonable agency to account. *See Commissioner, INS v. Jean*, 110 S. Ct. at 2321.

The amounts awarded under the administrative EAJA are a fraction of the EAJA's total cost. Between 1982 and 1989, a total amount of $1,770,308 was awarded, or an average of $221,288 each year. The number of applications filed has never exceeded 300, and the average award by an administrative agency has been $4,215, far below the $6,000 predicted by the CBO. *Annual Report of the Director of the Administrative Conference of the United States on Agency Activities Under the Equal Access to Justice Act*, Appendix II (July 31, 1990).

There is no reason to believe that applications for EAJA fees in connection with INS adversary proceedings are inconsistent with this trend. Although it may not be definitive, an INS submission to the U.S. Department of Justice in connection with *Matter of Anselmo*, Int. Dec. 3105 (BIA 1989), reproduced at pp. A5-A8 of the Appendix hereto, suggests that administrative EAJA's burden on the agency would be remarkably light.

> regulations concern simple matters of great concern to human beings, most of them of limited education.

Dong Sik Kwan v. INS, 646 F.2d 909, 919 (5th Cir. 1981).

It has long been recognized that the guidance of counsel is particularly critical in the immigration area:

> Over fifty years ago it was observed that in "many cases" a lawyer acting for an alien would prevent a deportation "which would have been an injustice but which the alien herself would have been powerless to stop." [citation omitted]. Since 1931 the law on deportation has not become simpler. With only a small degree of hyperbole, the immigration laws have been termed "second only to the Internal Revenue Code in complexity." [citation omitted]. *A lawyer is often the only person who could thread the labyrinth.*

Castro-O'Ryan v. INS, 487 F.2d 1307, 1312 (9th Cir. 1988) (emphasis added).

Asylum applicants who seek to navigate this system are faced with an adjudicatory process that has been the subject of persistent criticism. Decisions are often based on inappropriate criteria that are difficult to review in the absence of systematic articulation of standards. For example, the Refugee Act of 1980[13] was enacted primarily to ensure that asylum decisions are ideologically neutral. *See generally* Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. Mich. J.L. Ref. 243 (Winter 1984); Note, *Political Bias in U.S. Refugee Policy Since the Refugee Act of 1980*, 1 Geo. Immigr. L.J. 495 (1986). Yet, many commentators report that the INS appears to deny asylum claims on the basis of undue deference to foreign policy. *See, e.g.*, Fagen, *Applying for Political Asylum in New York: Law, Policy and Administrative Practice* at 13 (1984) ("[I]n the

13 Pub. L. No. 96-212, 94 Stat. 102.

vast majority of cases the [immigration] judges' final decisions coincided with those of the [State Department]").[14]

The principal standard contained in the Refugee Act—demonstration of a "well-founded fear" of persecution—was described by this Court as containing "ambiguity . . . which can only be given concrete meaning through a process of case-by-case adjudication." *INS v. Cardoza-Fonseca*, 480 U.S. at 448. Numerous subsidiary statutory terms and issues of burden of proof plainly require similar elaboration. This development of case law can only be coherent and useful if it is accessible to participants in the process. Yet, the Anker Study reports that "[s]ome of the most important principles in the [administrative Board of Immigration Appeals'] jurisprudence have only been articulated in unpublished decisions. . . . The BIA also chooses to publish as binding precedent few cases in which asylum is granted." Anker Study, *supra*, at 255-256 n.8. Furthermore, "[s]ome of the published decisions are confused and contradictory." *Id.* at 255. The Anker Study concludes generally that:

> [T]he current adjudicatory system remains one of *ad hoc* rules and standards. Despite Congress' goals in creating statutory asylum procedures, factors rejected by Congress—including ideological preferences and unreasoned and uninvestigated political judgments—continue to influence the decision-making process.

Id.

To an adjudicatory setting fraught with uncertain standards and potential biases, aliens bring particular disabilities. The ABA delegation emphasized that "[s]pecial linguistic, cultural, and psychological disabilities make it extremely difficult for refugees to clearly articulate their experiences or

14 Recent statutory and regulatory changes may ameliorate some of these findings, but they are not yet fully implemented and they are no substitute for legal representation of applicants in individual cases.

freely discuss their views, particularly with government officials." ABA Asylum Report at 3.[15]

In the adjudicatory setting, as in the advisory setting, courts have recognized the critical role of counsel. *See, e.g., Colindres-Aguilar v. INS*, 819 F.2d 259, 262 (9th Cir. 1987) ("[r]etained counsel could have better marshalled specific facts in presenting petitioner's case for asylum and withholding of deportation"); *Rios-Berrios v. INS*, 776 F.2d 859, 863 (9th Cir. 1985) ("we are convinced that [the applicant's] asylum case will be more advantageously presented by retained counsel"); *Partible v. INS*, 600 F.2d 1094, 1097 (5th Cir. 1979) ("without the assistance of counsel, Partible was unable to explain the situation and to point out the unfortunate circumstances which singled her out [and] was unable to explore . . . difficult questions of . . . law"). The ABA delegation concluded that "[f]or applicants who lack knowledge of our language and legal system, full and effective representation by counsel is one of the most important factors to ensure a fair and accurate determination." ABA Asylum Report at 3.

To complete the paradigm of the situation envisioned by Congress when it enacted the EAJA, applicants must confront an agency that has been criticized for its unwavering opposition to even patently meritorious claims. The Anker Study, reviewing 149 asylum hearings conducted in a single immigration court over a two-year period, states that "[t]he trial attorneys took an oppositional stance in every case." Anker, *Determining Asylum Claims in the United States: An*

15 Communication problems are exacerbated by poor translations:

> The immigration court provides limited and poor quality foreign language interpretation for the majority of applicants, who are non-English speaking. Interpreters are chosen without any standardized selection criteria. . . . The credibility determination, an explicit factor in 42% of the decisions studied, is substantially affected by standard interpreter errors, for example, non-interpretation and misinterpretations of important parts of the applicant's testimony.
>
> Large portions of the hearing, including the basis of the decision denying the asylum claim, are not interpreted to the applicant.

Anker Study at 257.

Empirical Case Study at 81 (full report of data summarized in Anker Study; cited portion reproduced at p. A3 of Appendix). Anker continues, "In all cases the trial attorney decided to pursue deportation and never conceded to asylum until the hearings were completed." *Id.* at n.197. Another commentator asserts that "[e]ven when a refugee presents a strong asylum claim, the Immigration and Naturalization Service . . . generally contests the application by appealing an Immigration Judge's . . . decision." Stern, *Applying the Equal Access to Justice Act to Asylum Hearings*, 97 Yale L. J. 1459 (1988).

Not content with routine opposition at the hearing level, INS attorneys seem to " 'appeal every adverse decision regardless of the merits [and to] refuse to have stipulations.' " Watson, "No More 'Independent Operators': At INS, Lawyers in the Field Face New Regime," *Legal Times*, May 14, 1990, at 2 (quoting former INS General Counsel William Cook noting the practice and disapproving of it). *See also* Stern, *supra*, at 1471, citing May 2, 1988 Interview with Doris Meissner, former Acting Commissioner of the INS and now Senior Fellow, Carnegie Endowment for International Peace, for description of the agency's "vigorous opposition to adjudicated asylum claims, often *irrespective of the merits*" (emphasis added).

Indeed, there are reports of positive abuse. In the decision in *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1494 (C.D. Cal. 1988), *aff'd*, 919 F.2d 549 (9th Cir. 1990), the court related the problem of Salvadorans apprehended at the border who "are eligible to apply for political asylum and to request a deportation hearing prior to their departure from the United States," but who, in "the vast majority . . . sign voluntary departure agreements which commence a summary removal process." 685 F. Supp. at 1494. The Court found that:

> The widespread acceptance of voluntary departure is due in large part to the coercive effects of the practices and procedures employed by INS and the unfamiliarity of most Salvadorans with their rights under United States immigration laws.

Id.

The court in *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983), *rev'd in part on other grounds*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985), describes other coercive practices—and their devastating results—employed with respect to Haitian refugees:

> [T]he Immigration and Naturalization Service . . . held mass "exclusion" hearings for Haitian immigrants to determine whether they were admissible to this country, or should be deported. Many hearings were held behind locked doors in courtrooms from which counsel attempting to inform the Haitians of their rights were barred. Overwhelming evidence established that Creole translators were so inadequate that Haitians could not understand their rights. Pursuant to these faulty hearings many Haitians were adjudged excludable from this country, and were subject to deportation.

711 F.2d at 1462-63.

Not surprisingly, the GAO reports that asylum applicants who are represented by counsel before immigration judges are three times as likely to receive approval as those who are unrepresented. GAO, *Asylum: Approved Rates for Selected Applicants*, Appendix Table 1.1 (June 1987).

These observations and data suggest precisely the system of "truncated justice" and "coerced compliance" that the EAJA was designed to reform. *See* H.R. Rep. No. 1418, *supra*, at 10. In the EAJA's legislative history, the Committee Reports of both the House and Senate deplore the ability of "the Government with its greater resources and expertise [to] in effect coerce compliance with its position. Where compliance is coerced, precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views." S. Rep. No. 253, *supra*, at 5; H.R. Rep. No. 1418, *supra*, at 10. Both reports

underscore Congressional intent that "fee-shifting become . . . an instrument for curbing . . . the unreasonable exercise of government authority." S. Rep. No. 253, *supra*, at 7; H.R. Rep. No. 1418, *supra*, at 12.

Indeed, there are indications that the concept of fee-shifting itself might be of heightened effectiveness in the deportation context. The ABA delegation reported that:

> While sympathetic to detainees needs for representation, members of the bar with whom we met voiced concerns that the asylum process is so specialized, so complex, and so time consuming that providing pro bono assistance in even one case would be burdensome and unattractive to most practitioners.

ABA Asylum Report at 17. Obviously, the prospect of fees should additionally encourage a sympathetic bar to undertake representation of meritorious claims.

Yet, the INS asserts that it is exempt from the remedial measures of the EAJA because the procedural requisites of deportation hearings were modelled after, rather than expressly set forth in, the APA itself. This assertion simply should not hold under the weight of Congress' clearly expressed intent "to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." *Commissioner, INS v. Jean*, 110 S. Ct. at 2321; *see also Sullivan v. Hudson*, 490 U.S. 877, 883 (1989), and "dual concerns of access for individuals and improvement of Government policies." *Commissioner, INS v. Jean*, 110 S. Ct. at 2322.

CONCLUSION

For all of the foregoing reasons, *amicus* American Bar Association requests that this Court hold that the EAJA applies to deportation hearings.

Respectfully submitted,

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APPENDIX

A1

Determining Asylum Claims in the United States: An Empirical Case Study

The implementation of legal norms in an unstructured adjudicatory environment

By Deborah E. Anker

(Excerpt from unpublished draft being prepared for publication in N.Y.U. Journal of Law and Social Change, Fall 1991.)

[excerpt]

* * *

for the applicant.[195] In one case where the judge had entered an *in absentia* order because the lawyer arrived for the hearing late, and the judge stated he would reopen the case if the government agreed, the trial attorney refused. "My client [INS] wants a deport order. We couldn't have done better."[196]

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195 Hearing no. 96. In this case, involving an Iranian Jew whose family had played a leadership role in a Jewish group in Iran, the trial attorney did not challenge the applicant's eligibility for asylum. The State Department had issued an opinion letter stating that the applicant had a well-founded fear of persecution in Iran, but suggesting that he was firmly resettled in Israel and therefore did not merit protection in the United States. Thus, the only issue was whether asylum should be granted or denied in the exercise of discretion. The applicant had spent some time in Israel (where he had the automatic right to citizenship) before coming to the United States and also had a criminal conviction in the United States for fraudulent use of a credit card. The sentencing judge in the criminal case had issued a formal "judicial recommendation against deportation." Despite the recommendation which precludes the use of conviction as a basis for deportation, or, under some precedents, as the basis for automatic denial of certain forms of discretionary relief, the immigration judge found that the applicant was statutorily ineligible for voluntary departure relief, based on the conviction. (*See* former 8 CFR Section 241.1 (1990). Note that this regulation was effectively repealed by the Immigration Act of 1990.) The trial attorney commented to the observer that the judge had made a mistake (the BIA has held that with such a recommendation, an alien is not ineligible for voluntary departure relief) and that the lawyer could have argued that the applicant could be awarded voluntary departure as a matter of discretion. He apparently did not feel under an obligation to inform the court or the applicant's lawyer of the error.

196 Hearing no. 193. In another case, a trial attorney commented to an observer that he believed trial attorneys should not oppose cases that were meritorious. Quoting a superior in the General Counsel's office, he said "if it's a real asylum case, you'll know it and the government shouldn't object."

The comment was made during a hearing in a case (no. 88) involving an Ethiopian who testified that he had been imprisoned and severely tortured as a result of his participation in an opposition political group. The observer notes that he testified well; an expert also testified that he would be killed if he returned. The judge indicated he was inclined to grant asylum and he asked for the trial attorney's position. The trial attorney stated that he initially agreed, but wanted to cross-examine. His cross-examination focused on the applicant's misrepresentations to the U.S. consul in order to obtain a visa to come to the United States. He also challenged the applicant, who had lived in France before coming to the United States, for not "wait[ing] his turn in line for U.S. refugee processing." He argued to the judge that since the applicant had lied to get a visa and was educated his entire case could have been fabricated. "He's smart enough to have memorized the country report for Ethiopia." Eventually the judge granted withholding of deportation, but denied asylum as a matter of discretion.

The trial attorneys took an oppositional stance in every case.[197] In most cases, including in those in which the State Department opinions recommended a grant of asylum, the government did not concede that the applicant merited asylum until after a decision had been issued. In a meeting between lawyers and trial attorneys, the lawyers complained of this practice,[198] arguing (from the Trial Attorney's Hand-

197 In all cases the trial attorney decided to pursue the deportation and never conceded to asylum until the hearings were completed. As noted, eventually, the trial attorney did not pursue an appeal to the BIA in five out of the seven cases granted. *See supra* note 52. (The two in which the INS did pursue an appeal were the Colombian Judge and Afghan cases.) There were very few exceptions, *viz.* the grants of asylum in the Nicaraguan and the Lebanese cases. In the Ghanaian case the trial attorney also agreed to asylum, but only after receiving a recommendation from the CIA.

The government's uncompromising oppositional stance is in some ways best illustrated in the Colombian judge's case. There the U.S. consul had given the judge a visitor's visa in order to facilitate his departure from that country because his life was in danger. The State Department had recommended that he be allowed to stay, for the same reason. This seemed to be a clear case in which the government should have exercised its prosecutorial discretion to allow him to stay, for example, in an extended voluntary departure status. Instead, when asked by the immigration judge what could be done to resolve the applicant's status, the trial attorney checked with his superiors and came back into court stating that "the position of the U.S. government is that Colombia is a democracy."

198 Lawyers complained of what they regarded as the trial attorneys' unbending oppositional stance with respect to other matters as well. One lawyer, for example, asked why it was the overwhelming policy of the trial attorneys to oppose expert witnesses ("The odds are so much in [the trial attorney's] favor and the respondent has the burden. [Their opposition is] pointless"). Later the same attorney complained that "The trial attorney will ask very detailed questions of the applicant—about omissions between the

book) that as representatives of the government, the trial attorneys have a responsibility to see that "justice is done." One trial attorney, while denying that no cases were unopposed, described the reasons for his contrary conceptions of the duties of the trial attorney. An asylum hearing, he argued, is not a criminal case in which the government has a burden to produce exculpatory evidence or to make choices in the interests of justice of efficiency not

* * *

application and the testimony or about exact dates. This is a low blow. Maybe you don't realize what we do to prepare. It's a rare client who reads every word in an affidavit; in Central American cases, they don't read at the level to pick up every discrepancy. It's not fair." While the federal and BIA case law now held that minor discrepancies should not affect credibility, she pointed out, the trial attorneys had not modified their cross-examination tactics.

Lynda Guild Simpson
Deputy Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
Washington, D.C. 20530

Re: *Matter of Anselmo*, Int. Dec. 3105 (BIA 1989), and *In Re Hendyah Ahmed Shaker*, A27 560 431 (BIA, May 12, 1989).

Dear Ms. Simpson:

This is in response to the Attorney General's request for information about any other cases pending before the Board of Immigration Appeals (Board or BIA) presenting the issue of whether the award provisions of the Equal Access to Justice Act (EAJA), 5 U.S.C. § 404 and 28 U.S.C.A. § 2412 (Supp. 1989) apply to deportation and exclusion proceedings, and about any other cases in which an Immigration Judge (IJ) has awarded fees under EAJA.

INS Western Region has the following cases in which EAJA fees have been awarded or motions for fees have been made:

Maria Candelaria Cedillo-Vasquez, A34 592 130. The IJ awarded $1,575 on 8/16/89. Appealed to BIA on 8/30/89. (Los Angeles)

Arabo, A24 252 916. $1,658 awarded. Certified to the Board and still pending. (San Diego).

Susan Ying, A27 585 204. The IJ awarded $18,076.47 after granting suspension of deportation at a reopened deportation hearing. On appeal to BIA and awaiting transcription of the hearing. (San Francisco)

Pablo Anselmo-Martinez, A27 529 931. The IJ awarded $2,745 on 10/13/89. Appealed to BIA 10/17/89. (Phoenix)

Jose Rigoberto Reyes-Salgado. A28 754 607. On 12/5/89 the IJ awarded $4,577.52. Appealed on 12/11. Awaiting briefing schedule. (Phoenix)

Edward Keith Pittman. A36 396 129. Filed 10/26/89. Decision of IJ is pending. $5,497.36 in EAJA fees requested. (Phoenix)

Humberta Luz Martinez-Ramirez. A28 335 038. (also A28 335 035, 036, 037, 039, 040, 041). Motion filed 12/12/89. Service response pending. EAJA fees requested-$2,025. (Phoenix)

Alba A. Hernandez-Rivera. A29 323 958. Filed 12/1/89. Service response pending. $300 in EAJA fees requested for cost of reply brief to Service Motion for Summary Dismissal of Appeal. Decision of IJ pending. (Phoenix)

In addition, in Lai Fong Hui, A27 446 375, the IJ denied the motion for fees and the respondent appealed.

INS Southern Region has the following cases in which EAJA fees have been awarded:

Maria Isabel Saa. A28 852 512. The decision was appealed to the Board, which set aside the award on May 12, 1989. (Miami)

In Re Romman. A27 714 564. The IJ awarded $500. A motion to reopen has been filed with the IJ by the Service. (Atlanta)

INS Northern Region has the following cases involving EAJA fees:

Rassaud Rahmani, A23 641 348. This motion for $4,761 in fees is pending before the IJ. (Kansas City)

Kaivan Saidia, A23 641 562. This motion for $13,063 in fees is pending before the IJ. (Kansas City)

Rodolfo Padilla-Hernandez, A37 724 325. This motion for $13,063 in fees is pending before the IJ. (Kansas City)

H. Lincoln Stewart, A27 639 770. This motion for $10,205 in fees is pending before the IJ. (St. Paul)

Roger Miravete-Novello, A24 762 875. This motion for $1,960 in fees is pending before the IJ. (Chicago)

Francisco Gambou, A10 516 548. This motion for $972 in fees is pending before the IJ. (Chicago)

INS Eastern Region has no cases in which fees have been awarded. There has been one case in which an award was denied, which was appealed to the BIA:

Earle Clarke, A31 376 864. (This case was also appealed to the Court of Appeals for the 3d Circuit prior to a decision by the BIA). (Philadelphia)

The following cases have been received at the Board of Immigration Appeals (BIA):

Jose Escobar-Ruiz, A26 365 952. Appeal from a denial of fees. (Los Angeles)

Flor Hurtado-Cuadra and family (three cases), A27 616 005-007. Appeal from denial of fees. (Los Angeles)

Khadar Musa Hamide, A19 262 560 (eight cases). Appeal from denial of fees. (Los Angeles)

Muhamad Abbas Hashim, A29 065 949. EAJA fee motion pending with appeal on merits. (New York)

Hadi Eslamizar, A26 095 657. Appeal from denial of fees. (Phoenix)

Apolinar Hernandez Garza, A34 601 037. Remand from Court of Appeals to BIA; fees requested in connection with the remand. (Dallas)

Harold J. Amador-Castillo, A23 620 165. Appeal from denial of fees. (Harlingen)

Luis Gallardo-Lopez, A37 447 553. Appeal from denial of fees. (Harlingen)

Ana Lucia Hodge, A28 305 678. Appeal from denial of fees. (Houston)

Baldomero Delgado-Zamorano, A29 959 265. Appeal from denial of fees. (Harlingen)

The following cases are motions for fees filed directly with the BIA, and pending before it:

Rosa Nelly Valenzuela-Ortega, A24 835 087. (Los Angeles)

Abdul Wadi Bayaz, A28 732 910. (Los Angeles)

Jose Robles-Fuentes, A28 781 720 (Los Angeles)

Benigno Salvador Salas-Jordan, A27 413 750 (Los Angeles)

The case involving Hendyah Ahmed Shaker, A27 560 431, now before the Attorney General on certification, is also before the United States District Court for the Northern District of California, on a petition for declaratory judgment. The court continued the case, and urged the Attorney General to expedite his decision in the case. A status conference is set for May 4, 1990.

William P. Cook
General Counsel (Acting)

cc: Marc Van Der Hout, Esq.
Jonathan M. Kaufman, Esq.
Official file
Genco Log
Dixon

Clearances	*Initial*	*Date*
Division Head, J. Podolny	/s/ JP	2/1/90
Deputy GC, P. Virtue	/s/ PV	2/1/90
General Counsel (Acting), W. Cook	/s/ WC	2/1/90

INS:COCOU:EAJADD:DIXON:EWELL:633-2895/2/1/90

No. 90-1141

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

RAFEH-RAFIE ARDESTANI,
Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION & NATURALIZATION SERVICE,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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BRIEF AMICUS CURIAE OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

STATEMENT OF INTERESTS

Amicus AMERICAN IMMIGRATION LAWYERS ASSOCIATION is a national association of practicing lawyers and law school professors who practice and teach in the fields of immigration and nationality law. AILA has as its objectives, to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence therein; to promote reforms in the laws with regard thereto, and to facilitate the administration of justice therein; and to evaluate the standard of integrity, honor, and courtesy of

those appearing in a representative capacity in immigration, nationality, and naturalization matters.

The membership of amicus practice regularly before the Immigration and Naturalization Service (hereinafter INS) in all of its districts nationwide, including all district levels of the Executive Office for Immigration Review (hereinafter EOIR), and the Board of Immigration Appeals; amici appear as well before the federal district courts and federal circuit courts of appeal of the United States, and have argued matters of immigration, nationality, and naturalization before the Supreme Court of the United States.

AILA has a direct and serious interest in the development of the immigration law and in the case now before this Court. The issue upon which the court has granted *certiorari* directly involves the practice of immigration law and the interest of AILA's members. Whether qualifying aliens and their counsel will be able to recover attorney's fees in deportation proceedings brought by the federal government, is of direct interest to AILA's membership and its ability to represent individuals who otherwise would likely go unrepresented.

The familiarity of amicus with the nature of the proceedings involved, and the public interest at stake lead amicus to believe the court would benefit from the additional legal argument and interpretation with respect to the substantive question of law here at issue.

SUMMARY OF ARGUMENT

Deportation proceedings conducted pursuant to 8 USC § 1252 are adversary adjudications within the meaning of 5 USC § 504(a)(1). The definition of "adversary adjudication" contained at 5 USC § 504(b)(1)(C) including adjudications "under § 554" of Title Five where the position of the United States is represented by counsel, includes within it deportation

proceedings. The statutory phrase "an adjudication under § 554" is susceptible to an interpretation of "as defined by" or "under the meaning of".

The statutory statement of purpose, the structure of the Act, and legislative history support this construction. The Congressional reauthorization of EAJA supports a construction of the definition of an adversary adjudication that will effect the remedial purposes of the Act.

The views of the Administrative Conference of the United States (ACUS) were specifically contemplated by Congress to be considered and are entitled to deference. The Court should adopt (ACUS) position that when a party is subject to a trial type proceeding where the government takes a position and is represented in administrative proceedings an "adversary adjudication" takes place.

The overriding statutory purpose of EAJA, to provide for representation for individuals and small companies in litigation against the federal government, would be served by the application of EAJA to deportation proceedings. The application of EAJA to administrative deportation proceedings would not unduly burden the government, would deter unreasonable governmental conduct, and be of critical importance to asylum seekers and other individuals of limited means subject to deportation proceedings.

The provision in 8 USC § 1362 of a right to counsel "at no expense to the government" does not preclude fee shifting. This statutory provision is limited to a preclusion of claim of a right to counsel at government expense and has no application to the question as to whether the federal government is subject to a fee award where its position in an adversary adjudication is not "substantially justified".

ARGUMENT

I. APPLICATION OF THE EAJA TO ADMINISTRATIVE DEPORTATION PROCEEDINGS IS CONSISTENT WITH THE LANGUAGE OF THE ACT AND THE CLEAR INTENTION OF CONGRESS.

Deportation proceedings are conducted pursuant to 8 USC § 1252. The right of an individual to remain in the United States is determined in administrative proceedings assigned to the Attorney General. The Attorney General has delegated this authority to the Executive Office of Immigration Review. See 28 CFR § 0.115 et seq.

Deportation proceedings are conducted before immigration judges who are assigned by the Executive Office for Immigration Review. The Complainant is the Immigration and Naturalization Service. See generally, 8 CFR § 3.12-3.38.

The Immigration Service is represented by counsel. The conduct of the proceedings is trial like and the determination of deportability is made only upon the record before the immigration judge with the respondent having an opportunity to be present, a right to representation, a right to examine the evidence against him and to present evidence in his behalf, and to cross examine witnesses presented by the government. 8 USC § 1252(b).

As noted above, by regulation the prosecutorial function and adjudicatory functions now rest within separate agencies within the Department of Justice.

In 1980, Congress passed the Equal Access to Justice Act.[1] EAJA was extended and amended in 1985.[2]

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1. Equal Access to Justice Act (EAJA) enacted as Pub.L. No. 96-481, tit. II, 94 Stat. 2325 (codified at 5 USC § 504 and 28 USC § 22412(b)-(f) (effective October 1, 1981).

2. Equal Access to Justice Act, Extension and Amendment, Pub.L No. 99-80, 99 Stat. 183, amending 5 USC § 504 and 28 USC § 2412 (enacted August 5, 1985).

Essentially, "Congress carved the world of EAJA proceedings into 'adversary adjudications' and civil actions". *Sullivan v. Hudson,* 490 US__, 109 S.Ct. 2248, 2258 (1989). This case involves the portion of EAJA known as "administrative EAJA" under 5 USC § 504.

This past term in, *Commissioner, INS v. Jean,* 495 US__, 110 S.Ct. 2316, 2321 (1990), this court discussed the main purpose of EAJA. This Court stated ". . . the specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." Citing *Sullivan v. Hudson,* 109 S.Ct., at 2253. The Court took particular note of the Congressional findings and purposes set forth at § 202 of Pub.L. 96-481, *Commissioner, INS v. Jean,* 110 S.Ct., at 2322 n11.

Congress found that individuals and other small organizations may be deterred from seeking review of unreasonable governmental action because of the expense involved in vindicating their rights. Because of the greater resources and expertise of the United States, Congress established a different standard for litigation with the federal government than with a private litigant. Section 202(a) and (b) of Pub.L. 96-481. (Reprinted as a note to 5 USC § 504).

In *Sullivan v. Hudson,* 490 US__ 109 S.Ct. 2248 (1989), this Court found that EAJA was designed to rectify the Congressionally identified problem of having individuals of modest means be unable to contest unreasonable governmental conduct. Congress' answer was to provide attorneys fees for a prevailing party in a "civil action" or "adversary adjudication" unless the position of the United States was "substantially justified" or where "special circumstances" make an award unjust. 5 USC § 504a(a)(1). This Court had previously examined the meaning of the term "substantially justified" in *Pierce v. Underwood,* 487 US 552 (1988). This is the fourth occasion upon which this Court has had the opportunity to interpret the Equal Access to Justice Act.

Amicus submit that after an examination of the language of the statute in light of EAJA's purposes and legislative history as well as the position of the Administrative Conference of the United States (ACUS), that this Court must conclude that administrative deportation proceedings are "adversary adjudications" within the meaning of 5 USC § 504(a)(1).

The term adversary adjudication is defined in 5 USC § 504(b)(1)(C) as:

> 'Adversary adjudication' means: (i) An adjudication under § 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license. . .

As the United States is clearly represented in administrative deportation proceedings, the only remaining definitional question is whether these proceedings are "an adjudication under § 554".

The Department of Justice has taken the position that because deportation proceedings are not conducted pursuant to § 554, that EAJA does not apply to these proceedings. The position of the Justice Department stated in its entirety in the Supplementary Information section accompanying the regulation is as follows:

> Hearings conducted by the Immigration and Naturalization Service pursuant to 8 U.S.C. § 1226 (exclusion) and 8 USC § 1252 (deportation) are exempt from the requirements of the Administrative Procedures Act, *Marcello v. Bonds,* 349 U.S. 757 (1955). Therefore, the Act does not apply.

46 Fed. Reg. 48, 921 - 48, 922 (Oct. 5, 1981). This position continues to form the INS argument against the application of EAJA fees in deportation proceedings.

It is axiomatic that a determination of Congressional intent begins with the words used by Congress. *INS v. Cardoza-Fonseca,* 480 U.S. 421, 430 (1987). Thus, the initial inquiry is whether the phrase "under § 554" has a self evident plain meaning. Application of the "plain meaning rule" presupposes that a statute has a plain meaning. See *National Wild Life Federation v. Marsh,* 721 F.2d 767, 774 (11th Cir. 1983). Where the meaning of a term is not obvious, invocation of the "plain meaning rule" is inappropriate.

In *Newport News Ship Building and Dry Dock v. EEOC,* 462 U.S. 669 (1983), this Court found that the term "discriminate" was not defined and did not have any obviously ordinary meaning. This Court framed its task in terms of determining whether Congress intended merely to set aside its decision in *General Electric Company v. Gilbert,* 429 U.S. 125 (1978), or whether Congress intended to overrule its method of statutory interpretation in that case. The Court looked beyond the terms of the statute to the legislative history which contained criticism from both the House and Senate as to the reasoning in *Gilbert.* See *Newport New Ship Building and Dry Dock v. EEOC,* 462 U.S., at 676 and 678. Where Congress has enacted a statute using a commonly understood word or phrase, such as "damages" or "willful", see *U.S. v. James,* 478 U.S. 597, 604 (1986) and *McGlouglin v. Richland Shoe Company,* 486 U.S. 128 (1988), then it can be fairly be said that a term has a "plain meaning". This is also true where a term is specifically defined by statute in a manner that conveys a "plain meaning". See *Rubin v. U.S.,* 449 U.S. 424, 430 (1981).

However, where a term is susceptible to more than one plausible meaning, then resort to extrinsic sources, such as statements of legislative purpose and legislative history is appropriate. Cf *Newport New Ship Building and Dry Dock v. EEOC,* 462 U.S., at 676.

In *INS v. Cordoza Fonseca,* 480 U.S., at 442-443 and 446, the court examined the legislative history and purpose of the Refugee Act in construing what was a relatively clear statutory directive. *A fortiori* when a

statute such as 5 USC § 504(a) is susceptible to a number of interpretations, the court should consider other evidence beyond the bare words of the statute. Certainly, "statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible. *American Tobacco Company v. Patterson,* 456 U.S. 63, 71 (1982).

The three circuit courts which have specifically addressed this question have divided over whether § 504(a)(1) has a plain meaning. Compare *Escobar-Ruiz v. INS,* 838 F.2d 1020, 1023 (9th Cir. 1988) (en banc) with *Clarke v. INS,* 904 F.2d 172, 175 (3rd Cir. 1990) and *Ardestani v. U.S. Dept. of Justice, Immigration and Naturalization Service,* 904 F.2d 1505, 1508 (11th Cir. 1990). But see *Ardestani v. U.S. Dept. of Justice, INS,* at 1515-1517 (dissenting opinion of Judge Pittman).

In any event, the court should follow the "well established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute". *Bob Jones University v. U.S.,* 461 U.S. 574, 586 (1983). It is axiomatic that the statute should be considered as a whole and the interpretation of the statute should consider all of its language. The language in § 202(b) of Pub.L. 96-481 has to be considered in construing the statute. Congress could not have been more clear in its intentions. The purpose of reducing the deterrent effect of litigating with the federal government would be well served by interpreting "under § 554" to apply to administrative deportation proceedings.

The term is clearly susceptible to different constructions. The term "under § 554" can be reasonably understood as meaning procedures which meet the procedures set out in § 554. In this regard, it is clear that deportation proceedings now provide identical protection to the Administrative Procedures Act. At the time of the *Marcello* decision, the only major distinction was with regard to the issue of mixture of administrative functions. That is, under the Immigration Act, the

"special inquiry officer" could be from the Immigration Service itself, so long as the inquiry officer had not had a prosecutorial role. See 8 USC § 1252(b). Today, as noted above, the Executive Office of Immigration Review is a separate agency within the Department of Justice. Thus, the procedures under the Immigration Act are now identical to the Administrative Procedures Act.

The government relies on the implausible notion that Congress intended to exclude deportation proceedings. This assertion is undermined by the statement of purposes and the legislative history as set forth below.

Further, the court below and the court in *Clarke* have given § 504(a)(1) a narrow construction based on the precept that a waiver of sovereign immunity is to be strictly construed. Amicus submits that this rule of statutory construction has been misapplied as a tool in interpreting Congressional intent regarding the application of EAJA to administrative deportation proceedings.

Both courts relied heavily on several decision from this Court, in particular *Library of Congress v. Shaw,* 478 U.S. 310 (1986) and *Ruckelshaus EPA v. Sierra Club,* 463 U.S. 680 (1983). First, both of these decisions relied primarily upon other presumptions. In *Library of Congress v. Shaw,* the Court relied primarily on the long-standing rule that interest would not be recovered as part of a suit against the government in the absence of a clear waiver of sovereign immunity, *Library of Congress v. Shaw, supra,* at 318, "The no-interest rule" provides an added gloss of strictness upon these usual rules. Since the statute in question made no reference to interest, and only touched upon attorneys fees, the Court rejected an expansive reading to reach a result unlikely to have been intended by Congress.

The Court in *Ruckelshaus EPA v. Sierra Club, supra,* relied primarily upon the "American rule" against fee shifting to deny a losing party its attorney fee request. The Court's ". . . basic point of reference . . ." was the American rule. In addition, the court stated that

it was also relevant to consider the rule that sovereign immunity would be constrictly construed. *Ruckelshaus, supra,* at 685. The court stated, "in determining what sorts of fee awards are "appropriate", care must be taken not to enlarge § 307(f) waiver of immunity beyond what a fair reading of the language of the section requires". *Ruckleshaus, supra,* at 686.

In addition to having relied upon legal precepts not relevant to the issue before the Court, it is apparent that the two cases merely reflect an understanding that unless a statute can fairly be read to encompass a waiver of sovereign immunity, the Court will not reach out for an expansive ruling.

This Court has this term rejected a similar claim to apply the doctrine of sovereign immunity in *Irwin v. Veterans Administration,* 498 U.S.__, 111 S. Ct. 453,457 (1990) wherein the government argued that equitable tolling principles do not apply to it because a waiver of sovereign immunity must be strictly construed. This Court responded:

> Once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the Congressional waiver. Such a principle is likely to be realistic assessment of legislative intent as well as a practically useful principle of interpretation.

To the same effect is this Court's decision in *Franchise Tax Board of California v. U.S. Postal System,* 467 U.S. 512, 521 (1984). This Court admonished that a waiver of sovereign immunity need not be accomplished by "a ritualistic formula", rather an intent to waive sovereign immunity can be ascertained by reference to underlying Congressional policy.

EAJA is plainly a remedial statute entitled under general principles of statutory construction to be liberally construed. C. Sands, *Sutherland* On Statutory Construction § 60.01 (Sands, Fourth Edition, 1986 revision). Moreover, it is clear that Congress intended a broad waiver of sovereign immunity in enacting the EAJA. *Commissioner, INS v. Jean,* 110 S.Ct., at 2322 n11 and *Sullivan v. Hudson,* 109 S.Ct., at 2253.

In both cases, this Court has given effect to Congress' intentions that EAJA be construed to effect its primary purpose to eliminate barriers to litigating against unreasonable governmental conduct.

This court's decision in *Sullivan v. Hudson* is particularly instructive. In *Sullivan,* the court rejected the "plain meaning argument" that administrative proceedings conducted on remand from a district court could not be considered a "civil action". Instead, this Court applied the specific purpose of EAJA to find that attorney's fees would be available upon remand. This court would not ". . . ascribe to Congress an intent to throw the Social Security claimant a life line that it knew was a foot short." *Sullivan* at 2256.

Whatever doubt exists regarding Congressional intent from the face of the statute and its explicit statement of Congressional purpose, is removed by the legislative history. Courts below have debated whether the legislative history was sufficiently compelling to find that EAJA applied to administrative deportation proceedings. Compare *Escobar-Ruiz* with *Clarke* and *Ardestani.* See also *Owens v. Brock,* 860 F.2d 1363 (6th Cir. 1988) and *St. Louis Fuel and Supply Company, Inc. v. FERC,* 890 F.2d 446 (DC Cir. 1989). Perhaps, the legislative history does not compel the result suggested by Amicus if viewed as requiring an overwhelming statement of Congressional intent in opposition to clearly stated contrary language in the statute itself. However, as noted above, the legislative history must only support a "fair reading" of the statute. Read in this light, it is at a minimum convincing.

Had Congress wanted to ensure that only proceedings directly governed by § 554 were to be defined as adversary adjudications, Congress could plainly have done so. In fact, the Senate version of § 504 contained the language "subject to" § 554. See S.Rep. No. 96-253, 96th Cong., 1st Sess., 24-25 (July 20, 1979). As finally enacted "subject to" was changed to "under". It is fair to infer that Congress intended a different meaning by changing the words. It would indeed be ironic that in relying on the plain meaning rule, based upon the notion that Congress means what it says, that when Congress makes a change in language of this sort, that it has no meaning.

It is evident that the limitation to "adversary adjudications" was intended to apply to categories of proceedings and not categories of agencies which happen to fall directly under the APA. The limitation to adversary adjudications was to eliminate rule making or other less burdensome administrative proceedings. See H.R. No. 96-1418, 96th Congress, Second Sess., 14 (Sept. 26, 1980). The joint explanatory statement of the Conference Committee confirms this understanding. The Committee states that the Act, ". . . defines adversary adjudication as an agency adjudication defined under the Administrative Procedures Act where the agency takes a position through representation by counsel or otherwise." H.R. Conf. Rep. No. 1434, 96th Congress, 2d Sess., 23 (1980). As noted above, the word "under" was substituted for the Senate language "subject to". Thus, the legislative history supports the proposition that the definition of adversary adjudication was intended to apply to certain types of proceedings and not to certain agencies.

A further review of the legislative history reveals a plain intention to define an adversary adjudication in terms of trial type proceedings where the government takes a position and is represented. The original EAJA's legislative history is set forth primarily in the House Report (Judiciary Committee No. 96-1418, September

26, 1980, to accompany S.265); H.R. Report No. 96-1418, 96th Congress, 2d Sess., reprinted in 1980 U.S. Code Congressional and Administrative News 4984 et seq. The House Committee stated:

> It is intended that the definition precludes an award in a situation where an agency, e.g. the Social Security Administration does not take a position in the adjudication. If however, the agency does take a position at some point in the adjudication, the adjudication would then become adversarial. (House Report No. 96-1435, 23, reprinted in 1980 U.S. Congressional Code Administrative News, at 5012.)

Thus, the language "under § 554" was intended to narrow the scope of administrative EAJA to only certain types of proceedings. The committee further stated:

> It also reflects a desire to limit the award of EAJA fees to situations where participants have a concrete interest at stake but nevertheless may be deterred from asserting that interest because of the time involved in pursuing administrative remedies. (H.R. Rep. No. 96-1418, at page 14, 96 U.S. Congressional Code Administrative News, at 93).

Further evidence of Congress' intent is contained in the legislative history of the 1985 amendments enacted as the Equal Access to Justice Act, Extension and Amendment, Pub.L. 99-80. The House Committee once again considered the definition of an "adversary adjudication". The Committee noted that where the Secretary of Health and Human Services provided for representation for the agency before administrative law judges, it would be "precisely the type of situation covered by § 504(b)(1)(C)." H.R. Report No. 99-120, pt. I, 10, (1985), reprinted in 1985 U.S. Code Congressional and Administrative News, at 138-139. It is far from clear that social security benefit determination proceedings are proceedings conducted pursuant to the APA. See

Richardson v. Perales, 402 U.S. 389 (1971). It is clear that Congress intended that social security benefit proceedings be considered adversarial whenever the Social Security Administration was represented and took a position. It is only the lack of taking a position and counsel that kept these proceedings from being considered adversarial. See also *Sullivan v. Hudson,* 109 S.Ct. at 2257.

The result suggested by Amicus is further supported by the views of the Administrative Conference of the United States (ACUS). ACUS is the agency Congress designated as having particular expertise with regard to EAJA. Consultation with the Chairman of the Administrative Conference of the United States by each agency before it establishes rules and procedures governing applications for an award of EAJA fees is required at 5 USC § 504(c)(1). Further, the chairman of the Administrative Conference reports annually to Congress on the EAJA. 5 USC § 504(e). Thus, if any agency's views are entitled to deference, it is that of the Administrative Conference and not the Justice Department.

The court below in *Ardestani* inexplicably gives deference to the views of the Justice Department. *Ardestani,* at 1513. In doing so, the Court of Appeals distorted the doctrine of deference to administrative interpretation set forth in *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.,* 467 US 837 (1984).

First, it is clear that the views of the Administrative Conference support Amicus position. Pursuant to its mandate from Congress, the Administrative Conference promulgated model rules. 46 Fed. Reg. 32,900 (1981). Commentary to the model rules is instructive. ACUS proposed a broad interpretation of "under § 554", 46 Fed. Reg. at 32, 901. Part of the commentary is particularly applicable herein.

> Considering the purposes of the [EAJA], questions of its coverage should turn on the substance—the fact that a party has endured the burden and expense of a formal hearing—rather than the technicalities. 46 Fed. Reg. at 32,901.

The Court of Appeals found that because ACUS had the opportunity for consultation with the Department of Justice and did not criticize the Attorney General's interpretation, then the Justice Department's views are entitled to *Chevron* deference. The Court of Appeals plainly reads too much into ACUS' apparent failure to criticize the Justice Department rules. First, it would certainly not have been apparent in 1981 to either ACUS or Congress that deportation proceedings would not be considered to be adversarial adjudications. The first litigation on this issue took place in 1986. See *Escobar-Ruiz,* 787 F.2d 1294 (9th Cir. 1986). To infer that ACUS approved of the Justice Department exclusion of deportation proceedings from the scope of EAJA, buried in its Supplementary Information, would be an extraordinary assumption. In light of this specific discussion by ACUS cited above, it is clear that the views of the Administrative Conference support the application of EAJA to administrative deportation proceedings.

While the legislative history and the stated view of ACUS might not amount to a "clearly expressed legislative intention" which would rebut contrary statutory language, legislative history and administrative view certainly support a "fair reading" of the statute. The courts of appeals rejecting the application of EAJA to administrative deportation proceedings have foundered on the application of an unduly burdensome vision of what Congress must do to waive sovereign immunity. This construct has been used to support an implausible result. Is it unlikely that Congress intended that administrative deportation proceedings be excluded from the definition of adversary adjudications. This implausible result is rebutted by the statement of statutory purpose set forth in § 202(b) as well as the legislative history

replete with concern for individuals who confront unreasonable governmental action and would be deterred from litigating with the government, but for a fee shifting provision.

The limitations enacted by Congress in the definition of an adversary adjudication are apparent. They are aimed at limiting EAJA fees to trial type proceedings where the government was represented and took a position. These limitations were not in any way intended to exclude deportation proceedings which are identical in all respects to § 554 proceedings. Congress' consideration of social security benefit determinations, which are not clearly subject to the APA, is also highly probative of its intention.

Administrative deportation proceedings are precisely the type of proceedings which Congress intended to have the benefits of EAJA fee shifting. It is the classic confrontation between the full power of the federal government over the individual who will often be of modest means. What is at stake for the respondent in deportation proceedings is as important as any civil litigation. This court has stated that "deportation may result in the loss of all that makes life worth living". *Bridges v. Wixon,* 326 US 135, 147 (1945). Moreover, administrative deportation proceedings are the sole trial afforded to that individual. Judicial review is limited. See 8 USC § 1105.

Adequate legal representation for individuals of limited means who may often lack the ability to represent themselves buttress Amicus argument. The facts of *Ardestani* are illustrative of the problem. *Ardestani* was found to have a "well-founded fear of persecution" based on the views of the Bureau of Human Rights and Humanitarian Affairs of the Department of State. The arbitrary action of the Immigration Service in refusing to grant asylum under these circumstances is precisely the type of unreasonable, unthinking governmental conduct Congress sought to deter in enacting EAJA.

The value of counsel in administrative deportation proceedings cannot be overstated. Whether it is in interpreting the meaning of the term "conviction", *Clarke v. INS,* 904 F.2d 172 (3rd Cir. 1990), or in preparing an asylum application, the role of counsel is critical. See also, *United States General Accounting Office, Asylum Approval Rates for Selected Applicants,* Pub. No. GGD -87- 82 FS (June 1987) which reports that asylum applicants who are represented by counsel before immigration judges are three times as likely to receive approval as those who are unrepresented. As recently noted in *Montilla v. INS,* 926 F.2d 162, 170 (2nd Cir. 1991), "a lawyer might well have made a difference in the earlier proceeding—they usually do".

Without the availability of EAJA fees, many uneducated individuals, many of whom with a limited command of the English language, will face the full power of the federal government. Further, they will be faced with a statute considered comparable to our tax laws in complexity. *Lok v. INS,* 548 F.2d 37,38 (2d Cir. 1977). These individuals are less likely to have counsel available without the application of EAJA to successfully oppose unreasonable governmental conduct.

It must be reiterated that administrative deportation proceedings are a trial. Initially, the burden is on the government to establish by clear convincing and unequivocal evidence that the respondent is deportable. *Woodby v. INS,* 385 US 276 (1966). Once deportability has been established there is available to the respondent in deportation proceedings myriad forms of relief requiring the presentation of highly specified proof. These applications include an application for asylum/withholding of deportation pursuant to Sections 208 and 243 of the Immigration and Nationality Act, 8 USC § 1158 and 8 USC § 1253; an application for suspension of deportation pursuant to INA § 244, 8 USC § 1254; waivers of excludability or deportability pursuant to INA § 212(c) and § 241(f), 8 USC § 1182(e) and 8 USC

§ 1251(f). The value of counsel in these complex administrative proceedings cannot be overstated. Further, the danger that these individuals would be subject to arbitrary governmental action is well established.

In summary, a fair reading of the definition of an "adversary adjudication", encompasses the application of EAJA to administrative deportation proceedings, considering the expressed statutory purpose, legislative history, and administrative views of ACUS. Moreover, considering the trial-type proceedings, complexity, and importance of the proceeding, and the need for availability of counsel to ensure a fair proceeding, administrative deportation proceedings are precisely the type of proceeding Congress intended for which EAJA would be available.

II. § 292 OF THE IMMIGRATION AND NATIONALITY ACT, 8 USC 1362 DOES NOT BAR FEE SHIFTING

The Court of Appeals below found that § 292 of the INA 8 USC § 1362 barred fee shifting. The court reached this result by an extraordinarily torturous route.

Section 292 of the INA provides for a right to counsel in exclusion or deportation hearings at "no expense to the government". It is apparent from the face of this provision enacted in 1952 that it expressed a Congressional intention to deny to respondents in deportation proceeding appointed counsel, i.e. a public defender type system. See *Perez-Perez v. Hansberry,* 781 F.2d 1477 (11th Cir. 1986). On its face, it is implausible that it was intended to be an express bar to fee shifting.

The judicial EAJA provision, 28 USC § 2412(d)(1)(a), has an exception to the award of EAJA fees where fees are ". . . otherwise specifically provided by statute . . .". No comparable provision appears in administrative EAJA. See 5 USC § 504. Nonetheless, the Court of Appeals found that the existence of § 292 was a special circumstance that would make the award of attorney's fees unjust. *Ardestani,* at 1513-1514. See

also *Clarke v. INS,* at 177. The Court of Appeals interpreted § 292 as a bar to its ability to award attorney's fees.

This result lacks any textual basis in the statute and assigns to Congress an intent in § 292 that it could not have had. Congress has made it clear that the exception in judicial EAJA to fee shifting is a narrow one. Congress plainly intended to exempt only civil actions already covered by existing fee statutes. See H.R. Report No. 1418, p. 18, 1980 U.S. Congressional Code, Administrative News, at 4997 and *Escobar-Ruiz*, at 1027. Further, the 1985 Extension and Amendment made it clear that the exception in § 2412 was extremely narrow and applied only to statutes which specifically addressed fee shifting. See *National Wildlife Federation v. FERC,* 870 F.2d 542, 543 (9th Cir. 1989).

There exists a well established body of law under the Social Security Act rejecting a similar argument. The Social Security Act prohibits the collection of fees exceeding 25 percent of the past due benefits in § 405(b). However, the courts have rejected this provision as a limit on fee shifting. See *Watford v. Heckler,* 765 F.2d 1562, 1566 (11th Cir. 1985) (collecting cases) and *Wolverton v. Heckler,* 726 F.2d 580, 582 (9th Cir. 1984). The courts have found this provision did not specifically preclude fee shifting.

Because it is apparent that § 292 deals only with the agency's duty to provide counsel, it is obviously not the type of statute that Congress intended would bar fee shifting.

Congress has made it abundantly clear that only statutes which expressly preclude the award of fees prohibit fee shifting. In *Tulalip Tribes v. FERC,* 749 F.2d 1367, 1368 (9th Cir. 1984), the Court interpreted the Federal Power Act limitation on award of costs contained in 16 USC § 825p to bar an award of fees. In a reaction to *Tulalip Tribes,* Congress amended 28 USC § 2412(d)(1)(A). This broad interpretation of

2412(d)(1)(a) was rejected by Congress. See H.R. No. 120, 99th Cong., 1st Sess., pt. I, at 17.

Plainly, Congress intended the limitation on fee shifting to apply only to statutes which clearly on their face barred fee shifting. There is no support in the statutory language, legislative history, or judicial interpretation outside of the deportation context for the result reached below.

It should be plain that there is a distinction between a prohibition on a public defender type system and a statute which provides for fees only when the governments conduct is not substantially justified. These statutes are plainly not inconsistent and the application of EAJA to deportation proceedings does no harm to the text and purpose of § 292.

CONCLUSION

Amicus American Immigration Lawyers Association urge that the judgment of the United States Court of Appeals for the 11th Circuit be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, LAWRENCE H. RUDNICK, Esquire, hereby certify that a true and correct copy of the attached brief AMICUS CURIAE were served upon the following by prepaid postage first-class mail:

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